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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 377

JOSEPH S. FAY, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

No. 452

JAMES BOVE, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONS FOR CERTIORARI FILED { AUGUST 9, 1946. AUGUST 31, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN NEW YORK SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

JOSEPH S. FAY and JAMES BOVE, Defendants-Appellants

STATEMENT UNDER RULE 234

This is an appeal from a judgment of conviction of the defendants, Joseph S. Fay and James Bove, rendered at a Criminal Term of the Supreme Court, New York County, on the 5th day of April, 1945, after a trial had between February 26, 1945 and March 14, 1945 inclusive, before Honorable William H. Munson and a jury upon an indictment charging the defendants in one count with the crime of conspiracy and in six substantive counts with the crimes of extortion. The defendants were convicted on counts one and seven of the indictment. The jury disagreed with respect to count six. Defendants were acquitted on the remaining counts.

The appeal also brings up for review an order of Judge Jonah J. Goldstein, Judge of the Court of General Sessions, County of New York, denying the motion for an inspection of the minutes of the grand jury, and the order of Mr. Justice William H. Munson, dated the 9th day of February, 1945, denying the defendants' motion for a bill of particulars, the order of Mr. Justice William H. Mun-
[fol. 2] son, dated the 8th day of February, 1945 granting the motion of the District Attorney of New York County for a trial before a special jury, the order of Mr. Justice William H. Munson entered in the minutes of the proceeding overruling the challenge to the special panel of jurors, and the order of Mr. Justice William H. Munson, entered in the minutes of the proceedings had denying the defendants' motion to set aside the verdict of the jury on the ground that it is contrary to the evidence and contrary to law.

On the 5th day of April, 1945, the defendants, Joseph S. Fay and James Bove, were each sentenced to a term of one year in the New York County Penitentiary on count one of the indictment and two terms of not less than seven and one-

half years and not more than fifteen years on count seven of the indictment, the said sentences to run consecutively.

The People of the State of New York appeared by Frank S. Hogan, Esq., District Attorney of New York County; Sol Gelb, Esq., and Joseph A. Sarafite, Esq., Assistant District Attorneys; Vincent A. G. O'Connor, Esq., Deputy Assistant District Attorney.

The defendant, Joseph S. Fay, appeared by Robert J. Fitzsimmons, Esq., Thomas R. Fay, Esq., and John W. McGeehan, Jr., Esq.

The defendant, James Bove, appeared by Moses Polakoff, Esq.

There has been no change of attorneys.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

#7308—1944

PEOPLE OF THE STATE OF NEW YORK,

against

JOSEPH S. FAY and JAMES BOVE, Defendants

NOTICE OF APPEAL OF DEFENDANT JOSEPH S. FAY

SIRS:

Please take notice that the defendant, Joseph S. Fay, hereby appeals to the Appellate Division of the Supreme Court, First Department, from the judgment of conviction rendered against him in this Court on the 5th day of April, 1945, and from each and every part thereof and from each and every intermediate order therein made.

Dated April 9, 1945.

Yours &c., Thomas R. Fay, Robert J. Fitzsimmons, Attorneys for Defendant, Joseph S. Fay, Office & P. O. Address, 654 Madison Avenue, Borough of Manhattan, City of New York.

To Frank S. Hogan, District Attorney of New York County.

Archibald Watson, Clerk of the Supreme Court, New York County.

[fol. 4] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

against

JOSEPH S. FAY and JAMES BOVE, Defendants

NOTICE OF APPEAL OF DEFENDANT JAMES BOVE

SIR:

Please take notice that the defendant, James Bove, hereby appeals to the Appellate Division of the Supreme Court in and for the First Judicial Department from the judgment of conviction rendered against him in this Court, on the 5th day of April, 1945 and from the sentence imposed upon him pursuant thereto and from the whole and each and every part of said conviction and sentence.

Please take further notice that upon said appeal, the defendant, James Bove, will bring up for review, the order of Judge Jonah J. Goldstein, Judge of the Court of General Sessions, County of New York, denying the motion for an inspection of the minutes of the grand jury, and the order of Mr. Justice William H. Munson, dated the 9th day of February, 1945, denying the defendant's motion for a bill of particulars, the order of Mr. Justice William H. Munson, dated the 8th day of February, 1945 of the District Attorney of New York County for a trial before a special jury, the [fol. 5] order of Mr. Justice William H. Munson entered in the minutes of the proceeding overruling the challenge to the special panel of jurors, and the order of Mr. Justice William H. Munson, entered in the minutes of the proceedings had denying the defendant's motion to set aside the verdict of the jury on the ground that it is contrary to the evidence and contrary to law, the whole and each and every part of said orders and any actual decision of the trial court in any other intermediate order and any actual decision of the trial court in any other proceeding forming a

part of the roll as prescribed by Section 485 of the Code of Criminal Procedure.

Dated, New York, N. Y., April 12th, 1945.

Yours, etc., Moses Polakoff, Attorney for Defendant, James Bove, Office & P. O. Address, 475 Fifth Avenue, Borough of Manhattan, City of New York.

To Frank S. Hogan, District Attorney of New York County.

—— ——, Clerk of the Supreme Court, County of New York.

[fol. 6] In Court of General Sessions, County of New York

The People of the State of New York

against

Joseph S. Fay and James Bove, Defendants

Indictment

The Grand Jury of the County of New York by this indictment accuse the above named defendants Joseph S. Fay and James Bove of the crime of Conspiracy, committed as follows:

1. In or about the month of January, 1936, and continuously at all times thereafter up to the present time, in the County of New York and elsewhere, the said defendants Joseph S. Fay and James Bove, did wilfully, knowingly, unlawfully and corruptly conspire, combine, confederate and agree together and with each other and with divers other persons (said defendants together and with divers other persons are hereinafter called the "Conspirators") to commit a crime, to wit, the crime of Extortion in that the Conspirators did unlawfully, wilfully, knowingly and corruptly conspire to obtain money from divers individuals, partnerships and corporations engaged in the construction of, and in manufacturing, processing and supplying materials for, tunnels, dams, retaining walls, highways, water conduits and other construction projects in the counties of New York, Bronx, Westchester, Putnam, Dutchess, Ulster [fol. 7] and Orange in the State of New York and the counties of Bergen, Hudson and Essex in the State of New

Jersey, and elsewhere (all of which persons, partnerships and corporations are hereinafter called "Contractors") with the consent of said Contractors, their officers, agents and employees by the wrongful use of force and fear induced by the threats of the Conspirators to said Contractors, their officers, agents and employees to do an unlawful injury to the persons and property of said Contractors by unlawfully and corruptly fomenting and declaring strikes among their employees; by unlawfully and corruptly placing picket lines in front of and near the places of business of said Contractors; by unlawfully and corruptly using their power to prevent said Contractors from entering into contracts with the International Union of Operating Engineers and the International Hod Carriers, Building and Common Laborers' Union of America and other labor unions; by unlawfully and corruptly using their power to prevent said Contractors from employing members of said labor unions; by unlawfully and corruptly using their power to prevent said Contractors from employing members of said labor unions at prevailing rates of wages; by unlawfully and corruptly using their power to prevent said Contractors from employing efficient, skilled and competent workers; by unlawfully and corruptly using their power to prevent said Contractors from receiving efficient, skilled, competent and productive effort from their workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business of said Contractors.

[fol. 8] 2. It was a part of the conspiracy that the Conspirators should demand and obtain, in addition to other sums of money to be demanded and obtained from other Contractors, the following sums of money from the following Contractors, to wit, Seaboard Construction Corporation, amount demanded $125,000, amount obtained approximately $125,000; Utah Construction Company, amount demanded $129,000, amount obtained $129,000; Associated Contractors, Inc., amount demanded $250,000, amount obtained $150,000; Walsh Construction Corporation, amount demanded $125,000, amount obtained $62,000; B. Perini & Sons, Inc. and Louis R. Perini, amount demanded $50,000, amount obtained approximately $35,000; New York Trap Rock Corporation, amount demanded $12,000, amount obtained $12,000; J. F. Shea Co., Inc., and Henry J. Kaiser Co., amount demanded $109,000, amount obtained $109,000; Mason &

Hanger Co., Inc., amount demanded $60,000, amount obtained $36,000; George M. Brewster & Son, Inc., amount demanded $65,000, amount obtained $45,000.

All of the foregoing demands on the Contractors were to be made and were made under threats by the Conspirators to said Contractors, their officers, agents and employees to do an unlawful injury to the persons and property of said Contractors by unlawfully and corruptly fomenting and declaring strikes among their employees; by unlawfully and corruptly placing picket lines in front of and near the places of business of said Contractors; by unlawfully and corruptly using their power to prevent said Contractors from entering into contracts with the International Union of Operating [fol. 9] Engineers and the International Hod Carriers, Building and Common Laborers' Union of America and other labor unions; by unlawfully and corruptly using their power to prevent said Contractors from employing members of said labor unions; by unlawfully and corruptly using their power to prevent said Contractors from employing members of said labor unions at prevailing rates of wages; by unlawfully and corruptly using their power to prevent said Contractors from employing efficient, skilled and competent workers; by unlawfully and corruptly using their power to prevent said Contractors from receiving efficient, skilled, competent and productive effort from their workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business of said Contractors.

All of the foregoing monies, in currency of the United States of America, the properties of the respective Contractors, were to be obtained and were obtained by the Conspirators from the said Contractors, their officers, agents and employees with their consent by the wrongful use of force and fear induced by the said threats of the Conspirators.

Overt Acts

First: And in furtherance of said conspiracy and to effect the objects thereof, the defendant Joseph S. Fay met and conferred with Thomas Joseph Walsh and John S. MacDonald and obtained from the said John S. MacDonald the sum of $30,000 in the New York Athletic Club, located at 7th Avenue and 59th Street in the County and City of New York, on or about May 7, 1942.

[fol. 10] Second: And in furtherance of said conspiracy and to effect the objects thereof, the defendant Joseph S. Fay met and conferred with William P. Foss, Jr. and obtained the sum of $2,000 from said William P. Foss, Jr. in the office of the New York Trap Rock Corporation, 230 Park Avenue, in the County and City of New York, in the month of December, 1942.

Third: And in furtherance of said conspiracy and to effect the objects thereof, the defendants Joseph S. Fay and James Bove met and conferred with Harry F. McLean and Louis R. Perini in the County and City of New York, in or about May, 1938.

Fourth: And in furtherance of said conspiracy and to effect the objects thereof, the defendant Joseph S. Fay met and conferred with Thomas Moore Price and Stephen A. Healy in the New Yorker Hotel, located at 34th Street and 8th Avenue, in the County and City of New York, in or about November, 1941.

Fifth: And in furtherance of said conspiracy and to effect the objects thereof, the defendant, James Bove met and conferred with Miles I. Killmer and received from the said Miles I. Killmer the sum of $12,000 in the office of Mason & Hanger Co., Inc. in the County and City of New York, on or about August 22, 1941.

Sixth: And in furtherance of said conspiracy and to effect the objects thereof, the defendant Joseph S. Fay met and conferred with William J. Brewster and obtained from him the sum of $10,000 in the office of George M. Brewster & Son, Inc. in Bogota, New Jersey, in or about the month of December, 1942.

[fol. 11] Second Count

And the Grand Jury Aforesaid, by this indictment, further accuse the above named defendants of the crime of Extortion, committed as follows:

The said defendants, in the County of New York, from on or about April 1, 1938 to on or about July 1, 1942, wrongfully, wilfully and extorsively obtained the sum of approximately $125,000 in currency of the United States of America, the property of Seaboard Construction Corporation, a corporation, from Harry F. McLean and Louis

R. Perini, officers and agents of said corporation, with their consent by the wrongful use of force and fear induced by threats of said defendants to said Harry F. McLean and Louis R. Perini, officers and agents of said corporation, to do an unlawful injury to the property of said corporation by unlawfully and corruptly fomenting and declaring strikes among the employees of said corporation; by unlawfully and corruptly placing picket lines in front of and near the places of business of said corporation; by unlawfully and corruptly using their power to prevent said corporation from entering into contracts with the International Union of Operating Engineers and the International Hod Carriers, Building and Common Laborers' Union of America and other labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions at prevailing rates of wages; by unlawfully and corruptly using their [fol. 12] power to prevent said corporation from employing efficient, skilled and competent workers; by unlawfully and corruptly using their power to prevent said corporation from receiving efficient, skilled, competent and productive effort from its workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business of said corporation.

Third Count

And the Grand Jury Aforesaid, by this indictment, further accuse the above named defendants of the crime of Extortion, committed as follows:

The said defendants, in the County of New York, from on or about July 1, 1939 to on or about October 1, 1942, wrongfully, wilfully and extorsively obtained the sum of $36,000 in currency of the United States of America, the property of Mason & Hanger Co., Inc., a corporation, from Miles I. Killmer and William J. Brewster, officers and agents of said corporation, with their consent by the wrongful use of force and fear induced by threats of said defendants to said Miles I. Killmer and William J. Brewster, officers and agents of said corporation, to do an unlawful injury to the property of said corporation by unlawfully and corruptly fomenting and declaring strikes among the em-

ployees of said corporation; by unlawfully and corruptly placing picket lines in front of and near the places of business of said corporation; by unlawfully and corruptly using their power to prevent said corporation from entering into contracts with the International Union of Operating Engineers and the International Hod Carriers, Building [fol. 13] and Common Laborers' Union of America and other labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions at prevailing rates of wages; by unlawfully and corruptly using their power to prevent said corporation from employing efficient, skilled and competent workers; by unlawfully and corruptly using their power to prevent said corporation from receiving efficient, skilled, competent and productive effort from its workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business of said corporation.

Fourth Count

And the Grand Jury Aforesaid, by this indictment, further accuse the above named defendants of the crime of Extortion, committed as follows:

The said defendants, in the County of New York, from in or about June, 1937 to in or about December, 1942, wrongfully, wilfully and extorsively obtained a sum of $12,000 in currency of the United States of America, the property of New York Trap Rock Corporation, a corporation, from Stirling Tomkins and Wilson P. Foss, Jr., officers and agents of said corporation, with their consent by the wrongful use of force and fear induced by threats of said defendants to said Stirling Tomkins and Wilson P. Foss, Jr., officers and agents of said corporation, to do an unlawful injury to the property of said corporation by un- [fol. 14] lawfully and corruptly fomenting and declaring strikes among the employees of said corporation; by unlawfully and corruptly placing picket lines in front of and near the places of business of said corporation; by unlawfully and corruptly using their power to prevent said corporation from entering into contracts with the Interna-

tional Union of Operating Engineers and the International Hod Carriers, Building and Common Laborers' Union of America and other Labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions at prevailing rates of wages; by unlawfully and corruptly using their power to prevent said corporation from employing efficient, skilled and competent workers; by unlawfully and corruptly using their power to prevent said corporation from receiving efficient, skilled, competent and productive effort from its workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business of said corporation.

Fifth Count

And the Grand Jury Aforesaid, by this indictment, further accuse the above named defendants of the crime of Extortion, committed as follows:

The said defendants, in the County of New York, from on or about February 1, 1938 to on or about April 1, 1940, wrongfully, wilfully and extorsively obtained the sum of [fol. 15] approximately $35,000 in currency of the United States of America, the property of B. Perini & Sons, Inc., a corporation, and Louis R. Perini, from Louis R. Perini, an officer and agent of said corporation, with his consent by the wrongful use of force and fear induced by threats of said defendants to said Louis R. Perini, an officer and agent of said corporation, to do an unlawful injury to the property of said corporation and Louis R. Perini by unlawfully and corruptly fomenting and declaring strikes among the employees of said corporation; by unlawfully and corruptly placing picket lines in front of and near the places of business of said corporation; by unlawfully and corruptly using their power to prevent said corporation from entering into contracts with the International Union of Operating Engineers and the International Hod Carriers, Building and Common Laborers' Union of America and other Labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions; by unlawfully and corruptly using their power to prevent said corporation from employ-

ing members of said labor unions at prevailing rates of wages; by unlawfully and corruptly using their power to prevent said corporation from employing efficient, skilled and competent workers; by unlawfully and corruptly using their power to prevent said corporation from receiving efficient, skilled, competent and productive effort from its workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business of said corporation.

[fol. 16] Sixth Count

And the Grand Jury Aforesaid, by this indictment, further accuse the above named defendants of the crime of Extortion, committed as follows:

The said defendants, in the County of New York, from on or about July 1, 1938 to on or about May 7, 1942, wrongfully, wilfully and extorsively obtained the sum of $150,000 in currency of the United States of America, the property of Associated Contractors, Inc., a corporation, from David Small, Thomas Joseph Walsh and John S. MacDonald, officers and agents of said corporation, with their consent by the wrongful use of force and fear induced by threats of said defendants to said David Small, Thomas Joseph Walsh and John S. MacDonald, officers and agents of said corporation, to do an unlawful injury to the property of said corporation by unlawfully and corruptly fomenting and declaring strikes among the employees of said corporation; by unlawfully and corruptly placing picket lines in front of and near the places of business of said corporation; by unlawfully and corruptly using their power to prevent said corporation from entering into contracts with the International Union of Operating Engineers and the International Hod Carriers, Building and Common Laborers' Union of America and other labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions at prevailing rates of wages; by unlawfully and corruptly [fol. 17] using their power to prevent said corporation from employing efficient, skilled and competent workers; by unlawfully and corruptly using their power to prevent said corporation from receiving efficient, skilled, competent and

productive effort from its workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business of said corporation.

Seventh Count

And the Grand Jury Aforesaid, by this indictment, further accuse the above named defendants of the crime of Extortion, committed as follows:

The said defendants, in the County of New York, from on or about February 1, 1939 to on or about May 7, 1942, wrongfully, wilfully and extorsively obtained the sum of $62,000 in currency of the United States of America, the property of Walsh Construction Company, a corporation, from David Small, Thomas Joseph Walsh and John S. MacDonald, officers and agents of said corporation, with their consent by the wrongful use of force and fear induced by threats of said defendants to said David Small, Thomas Joseph Walsh and John S. MacDonald, officers and agents of said corporation, to do an unlawful injury to the property of said corporation by unlawfully and corruptly fomenting and declaring strikes among the employees of said corporation; by unlawfully and corruptly placing picket lines in front of and near the places of business of said corporation; by unlawfully and corruptly using their power to prevent said corporation from entering into contracts with the [fol. 18] International Union of Operating Engineers and International Hod Carriers, Building and Common Laborers' Union of America and other labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions at prevailing rates of wages; by unlawfully and corruptly using their power to prevent said corporation from employing efficient, skilled and competent workers; by unlawfully and corruptly using their power to prevent said corporation from receiving efficient, skilled, competent and productive effort from its workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business of said corporation.

All of the acts and transactions alleged in each of the several counts in this indictment are connected together and constitute parts of a common scheme and plan.

Frank S. Hogan, District Attorney.

[fol. 19] Cal. No. M
5/17/43—Each Bill

No. 7308—1944
NY 2 weeks

THE PEOPLE OF THE STATE OF NEW YORK

against

1. JOSEPH S. FAY B

and

2. JAMES BOVE, B
Defendants

INDICTMENT

Conspiracy, Extortion

§§ 580, 850, 851 P. L.

Frank S. Hogan, District Attorney.

A True Bill.

H. R. Sedgwick, Foreman.

(Stamp): Filed Apr. 21, '44. New York Co. Clerk's Office. Filed 17 day of May, 1943.

[fol. 20] ENDORSEMENTS ON INDICTMENT

COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

PEOPLE vs. JOSEPH S. FAY

Calendar No. —. Indictment No. 905-43

5/19/43.

Notice of Appearance

Filed by Robert J. Fitzsimmons.
Address: 654 Madison Ave.
Telephone: Re 4-7117.
Substitution —— ——.

Arraignment

Part 1 May 19, 1943.

Pleads Not guilty; with leave to withdraw or move with respect to the indictment within 14 days

Defendant brought into Court on Bench Warrant and bailed 5/19/43.

Bail

Part 1 May 19, 1943.

Bail fixed at Twenty-five Thousand Dollars.

Jonah J. Goldstein, Judge.

Bailed May 19, 1943. $25,000.
Surety: New York Cas. Co., 111 John St.

[fol. 21] Part——. ——, 19—.

Defendant offers to plead guilty of ——.
Acceptance of plea recommended by:

——, District Attorney.

Part ——. ——, 19—

Pleads guilty of ——.
Pending Sentence—Defendant:
Committed to ——, or Bail continued ——.

Part One April 5th, 1945.

District Attorney moves for Judgment. Court sentences Joseph S. Fay on Count #1 Conspiracy to the New York County Penitentiary for term of (1) one year and a fine of $500.00 and one day for each dollar of fine unpaid and on Count #7 Extortion States Prison for not less than 7½ years to 15 years—to serve Penitentiary Sentence first.

Wm. H. Munson, Justice.

Trial

Part 1. March 15th, 1945.

Judge William H. Munson

Tried and Convicted of Conspiracy and Extortion on 1st and 7th counts, Not Guilty on 2nd, 3rd, 4th and 5th Counts and disagree to 6th Count.

[fol. 22] Pleads guilty during trial——.

By Thos. R. Fay and R. J. Fitzsimmons.

Pending Sentence—Defendant: April 5th, 1945.
Committed to City Prison or Bail continued——.

Defendant's Sworn Pedigree

Name (true) Joseph S. Fay.
Name (alias) —— ——.
Age 53. Nativity U. S. Race W.
Nativity of father U. S.
Nativity of mother U. S.
Residence 527 Lake St., Newark, N. J.
Occupation V. Pres. Inter. Union of Oper. Eng.
Married Yes. Read Yes.
Write Yes. Speak English Yes.
Religion C.
Parents living Mother only.
Temperate Moderately.
Naturalized. 1st papers ——.
Naturalized. 2nd papers ——.
Previous Court Record No previous convictions.

Notice of Appeal Filed April 9, 1945.
By Thos. R. Fay and R. J. Fitzsimmons.
Certificate of Reasonable Doubt granted on April 23/45.
By Wasservogel—J. and Bail set at $25,000.00 Surety;
N. Y. Casualty Co.—4/23/45.

Disposition on Appeal:

By Appellate Division ——.
By Court of Appeals ——.

[fol. 23] Trial and Motion Calendar

Motion Cal. Part 1, Jun. 4, 1943.
Motion Cal. Part 1, Jul. 23, 1943.
Motion Cal. Part 1, Jul. 26, 1943.
Motion Cal. Part 1, Jul. 29, 1943.
Sup. Court, Part 1, Feb. 2, 1945.
Trial Sup. Court, Part 1, Feb. 26, 1945.
Sup. Court, Part 1, Feb. 27, 1945.
Sup. Court, Part 1, Feb. 28, 1945.
Sup. Court, Part 1, Mar. 1, 1945.
Sup. Court, Part 1, Mar. 2, 1945.
Mar. 5, 1945.
Mar. 6, 1945.
Mar. 7, 1945.
Mar. 8, 1945.
Mar. 9, 1945.

Mar. 12, 1945.
Mar. 13, 1945.
Mar. 14, 1945.
Mar. 15, 1945.
Apr. 5, 1945.

Part 1, Jun. 4, 1943.

Motion for a bill of particulars is submitted. Decision reserved.

Goldstein, J.

Part 1, Jul. 29, 1943.

Motion for permission to inspect Grand Jury minutes is submitted. Decision reserved.

Goldstein, J.

[fol. 24] Part 1, Jul. 30, 1943.

Motion for permission to inspect Grand Jury minutes is denied.

Goldstein, J.

See entries on other sheet 2/2/45.

Court of General Sessions of the County of New York

People vs. James Bove

Calendar No. ——. Indictment No. 905-43.

5/19/43.

Notice of Appearance

Filed by Moses Polakoff.
Address 475—5th Ave.
Telephone Lex. 2-6600.
Substitution ——.

Arraignment

Part 1, May 19, 1943

Pleads Not guilty; with leave to withdraw or move with respect to the indictment within 14 days.

Defendant brought into Court on Bench Warrant and bailed 5/19/43.

[fol. 25] **Bail**

Part 1, May 19, 1943.

Bail fixed at Twenty-five thousand dollars.
Jonah J. Goldstein, Judge.

Bailed May 19, 1943, $25.000.
Surety Continental Cas. Co., 75 Fulton St.

Part —. —— —, 19—.

Defendant offers to plead guilty of ——.
Acceptance of plea recommended by:
—— —— District Attorney.

Part ——. —— —, 19—.

Pleads guilty of ——.
Pending Sentence—Defendant:
Committed to —— —— or Bail continued —— ——.

Part ——. —— —, 19—.

On recommendation of the District Attorney ——.
—— ——, Judge.

[fol. 26] **Trial**

Part 1. March 15th, 1945.

Judge William H. Munson
Tried and Convicted of Conspiracy and Extortion on 1st & 7th counts, Not Guilty on 2nd, 3rd, 4th and 5th Counts and disagree as to the 6th Count.
Pleads guilty during trial ——.
Stenographer Anna Pollmann & Alfred J. Puci.
Pending Sentence—Defendant: April 5th, 1945.
Committed to City Prison or Bail continued ——.

Defendant's Sworn Pedigree

Name (true) James A. Bove.
Name (alias) ——.
Age 45. Nativity U. S. Race W.
Nativity of father Italy.
Nativity of mother Italy.
Residence 3432—28 St., Long Is. City.
Occupation Sec. Loc. Union #60.

Married Yes. Read Yes.
Write Yes. Speak English Yes.
Religion C.
Parents living None.
Temperate Mc ' .ately.
Naturalized. 1st papers ——.
Naturalized. 2nd papers ——.
Previous Court Record No previous convictions.

[fol. 27] Notice of Appeal Filed April 13, 1945, by Moses Polakoff.

Certificate of Reasonable Doubt granted on April 23/45, by Wasservogel—J. and Bail set at $25,000.00 Surety; Continental Casualty Co. 4/24/45.

Disposition on Appeal:
By Appellate Division ——.
By Court of Appeals ——.

Trial and Motion Calendar

Motion Cal. Part 1, Jun. 4, 1943.
Motion Cal. Part 1, Jul. 23, 1943.
Motion Cal. Part 1, Jul. 26, 1943.
Motion Cal. Part 1, Jul. 29, 1943.
Supr. Ct. Part 1, Feb. 2, 1945.
Trial Supr. Ct. Part 1, Feb. 26, 1945.
Sup. Part 1, Feb. 27, 1945.
Supr. Ct. Part 1, Feb. 28, 1945.
Supr. Ct. Part 1, Mar. 1, 1945.
Supr. Ct. Part 1, Mar. 2, 1945.
Mar. 5, 1945.
Mar. 6, 1945.
Mar. 7, 1945.
Mar. 8, 1945.
Mar. 9, 1945.
Mar. 12, 1945.
Mar. 13, 1945.
Mar. 14, 1945.
Mar. 15, 1945.
Apr. 5, 1945.

District Attorney moves for Judgment—Judgment of Court is—On Count #1 Sentence to the New York County [fols. 28-42] Penitentiary for term of (1) one year and a fine of $500.00 and one day for each dollar of fine unpaid and on

Count #7 Sentence to States Prison, Ossining, N. Y. for term of not less than 7½ years nor more than 15 years. The Penitentiary sentence to be served first.

Wm. H. Munson, Justice.

Part 1, Jun. 4, 1943.

Motion for a bill of particulars is submitted. Decision reserved.

Goldstein, J.

Part 1, Jul. 29, 1943.

Motion for permission to inspect Grand Jury minutes is submitted. Decision reserved.

Goldstein, J.

Part 1, Jul. 30, 1943.

Motion for permission to inspect Grand Jury minutes is denied.

Goldstein, J.

Supreme Ct. Part One

Feb. 2/45 Motion for Bill of Part.—Denied with one exception—Munson, J.

Feb. 2/45 Motion for Commission to take deposition outside State—Granted—Munson, J.

Feb. 2/45 Motion for Special Panel—Granted—Munson, J.

[fol. 43] ORDER TRANSFERRING PROCEEDING TO SUPREME COURT APPEALED FROM

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 18th day of April, 1944.

Present—Hon. Denis O'L. Cohalan, Justice.

No. 7308—1944

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH S. FAY and JAMES BOVE, Defendants

A motion having been made by Joseph S. Fay, one of the defendants herein, for an order removing the indictment and also all subsequent proceedings in the above-captioned

action, from the Court of General Sessions of the County of New York to the Supreme Court of said County, and said motion having duly come on to be heard on the 14th day of January, 1944,

Now, on reading and filing the notice of motion herein, dated the 21st day of December, 1943, the petition of Joseph S. Fay, verified the 21st day of December, 1943, a copy of the indictment against him and James Bove, charging them with the crimes of conspiracy and extortion, presented and field in the Court of General Sessions, held in and for the County of New York, on the 17th day of May, 1943, a copy of [fol. 244] the indictment against the defendant, Joseph S. Fay, charging him with the crime of conspiracy, presented and filed at an Extraordinary Term of the Supreme Court of the State of New York, held in and for the County of Orange, on the 17th day of June, 1943, all in support of said motion, and the affidavit of Frank S. Hogan, District Attorney of New York County, sworn to the 13th day of January, 1944, in opposition thereto, and after hearing Robert J. Fitzsimmons, attorney for the defendant, Joseph S. Fay, in support of said motion and Moses Polakoff, attorney for the defendant, James Bove, having appeared and orally joined in said application, and Frank S. Hogan, by Aaron Benenson, Assistant District Attorney, of counsel, having been heard in opposition thereto, and due deliberation having been had thereon, upon filing the opinion of the Court holding that good cause is shown for the granting of said motion, it is

Ordered, that the motion be and the same hereby is granted, and it is

Further ordered, that the indictment pending against the defendants, Joseph S. Fay and James Bove, and all subsequent proceedings pertaining thereto, be and they hereby are removed from the Court of General Sessions of the County of New York, to the Supreme Court to be held in and for the County of New York.

Enter,

D. O'L. C., J. S. C.

Filed Apr. 19, 1944. New York County Clerk's Office.

[fol. 45] In Supreme Court of New York, County of New York

The People of the State of New York

against

Joseph S. Fay and James Bove, Defendants

People's Notice of Motion for Special Jury

Sirs:

Please Take Notice that upon the annexed affidavit of Frank S. Hogan, sworn to January 25th, 1945, upon the indictment herein returned in the Court of General Sessions on May 17, 1943, and removed to this Court by an order dated April 18, 1944, and upon the defendants' pleas of not guilty thereto, entered in Part I of the Court of General Sessions on May 19, 1943, and upon all the other papers and proceedings heretofore had herein, the District Attorney of the County of New York will apply to a Trial Term, Part I (Criminal Term) of this Court, to be held in and for the County of New York at the Criminal Courts Building, in the Borough of Manhattan, City and County of New York, on February 2, 1945, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order directing that a Special Jury be drawn and selected pursuant to the provisions of Article 18-B of the Judiciary Law, to try the issues raised between the People of the State [fol. 46] of New York and the defendants.

Dated, New York, January 26, 1945.

Yours, etc., Frank S. Hogan, District Attorney, New York County.

To Robert J. Fitzsimmons, Esq., 654 Madison Avenue, Borough of Manhattan, City of New York, and

Thomas R. Fay, Esq., 1517 Franklin Avenue, Mineola, Nassau County, New York, Attorneys for defendant, Joseph S. Fay.

Moses Polakoff, Esq., 475 Fifth Avenue, Borough of Manhattan, City of New York, Attorney for defendant, James Bove.

[fol. 47] IN SUPREME COURT OF NEW YORK

[Same Title]

AFFIDAVIT OF FRANK S. HOGAN, READ IN SUPPORT OF PEOPLE'S MOTION FOR SPECIAL JURY

STATE OF NEW YORK,
County of New York, ss.:

Frank S. Hogan, being duly sworn, deposes and says:

I am the District Attorney of New York County.

On May 17, 1943, the Grand Jury of the County of New York returned an indictment charging the above named defendants with the crimes of Extortion and Conspiracy. The defendants were arraigned in Part I of the Court of General Sessions and entered pleas of not guilty on May 19, 1943.

By order of this Court, dated April 18, 1944, the said indictment was removed to this Court from the Court of General Sessions of the County of New York, and the same is now on file with the Clerk of this Court. [See — Misc. —, 48 N. Y. S. 2d 2; 268 App. Div. 135, 50 N. Y. S. 2d 1; — Misc. —, 50 N. Y. S. 2d 624.]

This application for a special jury is based upon the following grounds: (1) the prosecution is of the utmost importance; (2) the case is a highly intricate one; (3) the subject matter of the indictment and the issues to be tried have been so widely commented upon that an ordinary jury could not without delay and difficulty be obtained to try such issues; and (4) the due, efficient and impartial administra- [fol. 48] tion of justice would be advanced by the trial of this indictment by a special jury.

The defendant Fay is a vice-president of the International Union of Operating Engineers. Bove, at the time of his indictment, was a vice-president of the International Hod Carriers, Building and Common Laborers Union of America. These are two of the most powerful and important international unions in organized labor. Labor reports assert that the Engineers average membership for 1944 is 100,000 and that the average membership of the Common Laborers Union for 1944 is 350,000.

The defendants are charged with the actual extortion of $420,000.00 from contractors engaged in the construction of the Delaware Aqueduct for the Board of Water Supply of

the City of New York, a $300,000,000.00 project. They are also charged with conspiring with each other and with divers other persons to extort money from contractors in the Counties of New York, Bronx, Westchester, Putnam, Dutchess, Ulster and Orange, in this State, and in the Counties of Bergen, Hudson and Essex, in the State of New Jersey, and elsewhere. The indictment charges that the defendants unlawfully and corruptly obtained money from the contractors by means of threats of labor trouble and other lawful acts hindering, impeding and interfering with the business of the contractors.

The importance of this prosecution is apparent from several considerations: (1) the effect of the prosecution upon the relationship between the defendants and the hundreds of thousands of workers in their two international labor unions; (2) the huge amounts of moneys involved; (3) the [fol. 49] public nature of the Delaware Aqueduct project; (4) the effect of the prosecution upon industrial management.

The significance of this prosecution to labor is that union leaders of paramount influence are charged with having prostituted their important positions in organized labor for their selfish gain. Fay and Bove at the time of their indictment were International vice-presidents of two of the most numerically strong and strategically vital international unions in the construction industry. In addition, Fay was Business Representative of Local 825 of the Engineers Union in Newark, New Jersey; Bove was Financial Secretary-Treasurer of Local 60 of the International Hod Carriers in Yonkers, New York. These locals are important metropolitan affiliates of their respective Internationals. Fay continues to hold his position with the Engineers Union. Bove continues in his local capacity. Fay is well known throughout the nation as a leader of labor. Fay himself concedes that:

> "During his many years in the labor field your petitioner (Fay) has become well known to almost all persons and firms engaged in building and construction work." (Quotation from Fay's December 21, 1943 petition for a removal of this indictment from the Court of General Sessions to the Supreme Court, p. 2.)

Bove, who at the time of his indictment, in addition to a vice-presidency in the International Hod Carriers, held

the posts of member of the General Executive Board of the International and General Representative of the International and was in charge of the International's New [fol. 50] York Regional Office, is also familiar in the East to laboring men and to firms in the construction industry.

Inherent in the indictment is the accusation that Fay and Bove betrayed the members of their unions and breached their obligation of proper labor representation implicit in their high union positions. The outcome of this prosecution is thus of fundamental concern to working men and the labor movement.

The large sums which these defendants are accused of extorting in and of themselves furnish importance to this prosecution. The defendants are charged with the actual extortion of $420,000.00. The conspiracy count of the indictment details some $703,000.00 as being among the monies which these defendants conspired to extort and obtain.

The project on which various of the alleged victims of the defendants' extortions were engaged, the vast $300,000,000.00 Delaware Aqueduct water supply system, is one of a monumental public nature. This aqueduct, built by construction firms under contract to the Board of Water Supply of the City of New York, is a permanent public improvement the funds for which emanate fom the taxpayers of the City of New York.

Paralleling the positions of influence possessed by Fay and Bove in labor unions is the importance of the construction firms mentioned in the indictment. Among such firms are the following which had contracts with the Board of Water Supply of the City of New York for work on the Delaware Aqueduct. In each instance, the amount of the [fol. 51] Board of Water Supply contract is listed:

Associated Contractors, Inc., a syndicate composed of Walsh Construction Co., Davenport, Iowa, J. F. Shea Co., Inc., Los Angeles, California, Henry J. Kaiser Co., Oakland, California, The Utah Construction Company, Inc., Ogden, Utah, General Construction Co., Seattle, Washington, MacDonald & Kahn Co., Ltd., San Francisco, California $21,333,333.33;

Mason & Hanger Co., Inc., Lexington, Ky. $15,486,150.00;

J. F. Shea Co., Inc. and Henry J. Kaiser Co., a syndicate composed of J. F. Shea Co., Inc.

of Los Angeles, California, MacDonald & Kahn Co., Ltd., of San Francisco, California, Henry J. Kaiser Co. of Oakland, California, General Construction Co. of Seattle, Washington, Morrison-Knudson Co., Inc. of Boise, Idaho, The Utah Construction Company, Inc. of Ogden, Utah, and Pacific Bridge Co. of San
Walsh Construction Co. of Davenport, Iowa $11,111,111.11;
Walsh Construction Co. of Davenport, Iowa $11,111,111,11;
The Utah Construction Company, Inc., a syndicate composed of J. F. Shea Co., Inc.

[fol. 52]

of Los Angeles, California, Henry J. Kaiser Co. of Oakland, California, MacDonald & Kahn Co., Ltd., of San Francisco, California, Morrison-Knudson Co., Inc. of Boise, Idaho, J. H. McEachrow Co. of Seattle, Washington, The Utah Construction Company, Inc. of Ogden, Utah, and Pacific Bridge Co. of San Francisco, California $10,829,530.00;
Seaboard Construction Co., a syndicate composed of Harry F. McLean, Ltd. of Toronto, Canada, B. Perini & Sons, Inc. of Framingham, Mass., Frank J. Herlihy of Chicago, Illinois, and C. J. Maney, Inc., of Boston, Massachusetts $10,810,166.50;
George M. Brewster & Sons, Inc. of Bogota N. J.; and $3,406,895.00
B. Perini & Sons, Inc. of Framingham, Massachusetts $2,869,390.00.

These companies include the outstanding firms in the heavy construction industry in America.

Intricate questions of law and fact will be presented by the trial in this case. Transactions over a period of years will be presented and are alleged in the indictment to cover a period from January, 1936, to the date of the filing of the indictment in May, 1943. The interrelation of the acts of various officers of the contracting firms and of the defendants will present a complex factual situation for resolution by the jury. Numerous witnesses from all over the nation will testify. The trial will be undoubtedly a lengthy one. The defendant Fay has stated that the de-

[fol. 53] fense will call many witnesses (Fay's December 21, 1943 petition, supra, p. 5).

The subject matter of this indictment and the issues to be tried have been so widely commented upon that an ordinary jury could not without delay and difficulty be obtained to try such issues. The defendant Fay, particularly, has been the subject of substantial press comment for a period of years, not alone in the metropolitan area but throughout the nation.

He his himself stated that

> "every effort must be made upon the trial of the present indictment to prevent prejudice against him (Fay). This belief * * * is enforced by reference to the vigorous attacks upon him (Fay) for the last three years by a well known newspaper columnist, whose syndicated articles appear in newspapers throughout the country. Since 1940 this columnist has periodically attacked the honesty and reputation of your petitioner (Fay). He has commented upon the present charges on many occasions. *It will therefore be necessary to carefully examine the prospective jurors on the trial of the indictment as to the influence which his articles have had on their views toward your petitioner (Fay) and toward organized labor.*" (Italics mine, Fay's quotation from his said petition, p. 4.)

Indeed, Fay's notoriety became a subject of comment in the Supreme Court opinion granting the removal of the [fol. 54] indictment from the Court of General Sessions to the Supreme Court in this prosecution:

> "The Newspapers have not neglected these defendants. Fay, in particular, has been described in terms neither complimentary nor doubtful. Some of the comments roundly condemn his organization, his associates and their practices." [—— Mis. ——, 48 N. Y. S. 2d 2.]

The instant prosecution has received front page press attention throughout the nation as well as editorial comment by leading newspapers.

Based upon the foregoing facts, it is my belief that the due, efficient and impartial administration of justice in this case will be advanced by the trial of the issues by a

Special Jury, drawn and selected pursuant to the provisions of article 18-B of the Judiciary Law.

I respectfully request, therefore, that an order be made and entered herein directing the impaneling of such a Special Jury, and I respectfully suggest that the clerk be directed to summon 300 special jurors for that purpose.

Frank S. Hogan.

Sworn to before me this 25th day of January, 1945. Anna Berson Sperry, Notary Public, Kings County. Kings County Clerk's No. 365. Certificate filed in N. Y. Co. N. Y. Co. Clerk's No. 506. Commission Expires March 30, 1946.

[fol. 55] IN SUPREME COURT OF NEW YORK

[Same Title]

AFFIDAVIT OF ROBERT J. FITZSIMMONS AND MOSES POLAKOFF, READ IN OPPOSITION TO PEOPLE'S MOTION FOR SPECIAL JURY

STATE OF NEW YORK,
County of New York, ss:

Robert J. Fitzsimmons and Moses Polakoff, being duly sworn, each for himself deposes and says:

We are attorneys and counselors at law duly authorized to practice in the courts of the State of New York and are attorneys for the defendants, Joseph S. Fay and James Bove respectively.

We are respectfully submitting this affidavit in opposition to the motion made herein directing that a special jury be drawn and selected pursuant to the provisions of Article 18B of the Judiciary Law, to try the issues raised by The People of the State of New York and the defendants.

The application for a special jury is opposed on the ground that a trial by a "blue ribbon jury" instead of a jury chosen fom the regular panel will deprive these defendants of the right to a trial by a jury in accordance with the constitutional provisions. Moreover, in view of the statements made in the moving affidavit, fair play and equal justice before the law require the denial of the application.

It is a notorious fact and an investigation actually dis-

closes that special or "blue ribbon" jurors are generally businessmen, frequently manufacturers, real estate owners, brokers, bankers and other persons in the upper income brackets. There are very few, if any, members of the [fol. 56] laboring class on these special panels and it is also fair to state that there are practically no special jurors who are members of a labor union. As a consequence, the training and background and businesses of the special jurors generally create and arouse a prejudice and hostility against labor union activities and labor union officials.

The general conception that special jurors possess a super intelligence and therefore particularly skilled in deciding intricate questions of fact or cases involving substantial sums of money has been proven to be wholly imaginary and false. In fact, the falseness of this conception received official recognition in the various reports of the Judicial Council of the State of New York, composed of eminent members of the Bar of the State of New York, members of the Court of Appeals and the two presiding justices of the Appellate Divisions, First and Second Department. (Please see Fourth Annual Report, pp. 46-47; Fifth Annual Report, pp. 42-43; Sixth Annual Report, p. 197.) These reports conclude after very thorough and careful investigation of special juries that these blue ribbon jurors taken from the ordinary jury list are simply "convicting juries" and not composed of jurors endowed with any superhuman intellect.

The reference in the moving affidavit to large sums of money allegedly involved in this prosecution is no sound justification for drawing a special jury. The reference therefore in the affidavit that the alleged extortions total $120,000 and that the Delaware Aqueduct Water Supply System was a $300,000,000 "monumental public works", and the reference in the affidavit to the total amount of [fol. 57] contracts awarded to the various contractors are entirely immaterial and calculated to obscure and confuse the merits of the present application.

Neither the size of the contracts awarded, nor the nature or extent of the water supply system involved are issues in this case.

The sole issue in this case is whether the defendants conspired by force and threats to extort money from the per-

sons named in the indictment. Such cases have been tried by ordinary juries since the statutory creation of this crime in 1881.

This case if of course important, as is every case, and the importance of the trial certainly furnishes no particular reason by itself in departing from the general conception of due process in accordance with equity and justice and the constitutional provisions.

There is an attempt in the moving affidavit to change the complexion of this particular prosecution by urging its effect upon industrial management (Moving Affidavit, top of page 3). Reference is made to the alleged effect of the prosecution upon the relationship between the defendants and the hundreds of thousands in workers in and to international labor unions (Moving Affidavit, page 2).

It is respectfully submitted that if this prosecution is to have the effect anticipated by the prosecution, it becomes more important that these defendants be tried by a jury of their peers composed of persons representative of our entire society and every walk of life and not by a jury "specially" chosen from persons in the upper income-brackets who are likely to have a prejudice against all union activities and union officials.

[fol. 58] It is respectfully urged that the entire special jury panel is chosen in a manner which does not comport with the concept of the jury as a cross section of the community. In behalf of the defendants, it is urged that Article 18B of the Judiciary Law of the State of New York is unconstitutional because it deprives the defendants of a trial by jury of their peers. The law is entirely too broad in its terms and empowers the officer having jurisdiction thereof to select persons as special jurors without any particular standard of qualifications. This tends to and actually leads into selections of persons as special jurors not representative of the community. The fact that the special jury list, consisting of approximately 3000 persons does not contain the names of many persons who are members of a labor union or who are generally members of the laboring class but contains a disproportionate number of bankers, brokers and executives, demonstrates the unfairness and unconstitutionality of the law and its application.

For all of the above reasons, it is therefore respectfully submitted that the application should be denied.

Robert J. Fitzsimmons, Moses Polakoff.

Sworn to before me this 1st day of February, 1945. Freda D. Maisel, Notary Public. Bronx Co. Clerk's No. 7, Reg. No. 54-M-6. N. Y. Co. Clerk's No. 488, Reg. No. 291-M-6. Term Expires March 30, 1946.

[fol. 59] ORDER GRANTING PEOPLE'S MOTION FOR SPECIAL JURY APPEALED FROM

At a Trial Term, Part I, Criminal Term, of the Supreme Court, held in and for the County of New York, at the Criminal Courts Building, in the Borough of Manhattan, City and County of New York, on the 8th day of February, 1945

Present—Hon. William H. Munson, Justice.

[Same Title]

An indictment having been found in the Court of General Sessions of the County of New York against the above named defendants on May 17, 1943, charging said defendants with the crimes of Extortion and Conspiracy in violation respectively of section 850 and section 580 of the Penal Law of the State of New York, and said indictment having been removed to this Court by an order dated April 18, 1944, and an issue of fact having arisen upon said indictment, and upon the pleas of Not Guilty thereto entered by said defendants, and the District Attorney of the County of New York having applied for a special jury, pursuant to law, and the District Attorney of the County of New York having appeared in support of said motion, and Robert J. Fitzsimmons, of counsel, for the defendant Joseph S. Fay, and Moses Polakoff, of counsel for the defendant James Bove, having appeared in opposition thereto,

Now, upon reading and filing the notice of motion herein and the affidavit of Frank S. Hogan, District Attorney of [fol. 60] New York County, sworn to on January 25, 1945, thereto annexed, in support of said motion, and upon the joint affidavit of Robert J. Fitzsimmons and Moses Polakoff,

sworn to on February 1, 1945, submitted in opposition thereto, and upon the indictment against the defendants herein filed in the office of the Clerk of the Court of General Sessions of the County of New York on May 17, 1943, and the pleas of Not Guilty entered by the defendants on May 19, 1943, and it appearing to my satisfaction that by reason of the facts stated in the moving papers an ordinary jury cannot be obtained without delay and difficulty to try said issue, and that by reason of said facts, the due, efficient and impartial administration of justice in this case will be advanced by the trial of said issue by a special jury;

Now, on motion of Frank S. Hogan, District Attorney of the County of New York, it is hereby

Ordered, that said application be, and the same hereby, is, granted, and that said issue of fact in said criminal action between the People of the State of New York and the above named defendants on said indictment, and the defendantss' pleas thereto, be tried before a special jury drawn and selcted pursuant to law; and it is further

Ordered, that the drawing of said special jury take place in the office of the County Clerk of the County of New York, on February 14, 1945, at eleven (11:00) o'clock in the forenoon of that day, and that three hundred (300) special [fol. 61] jurors be thus drawn for the trial of said issue as aforesaid; and it is further

Ordered, that said special jurors so drawn shall attend at Trial Term, Part I, Criminal Term of the Supreme Court, held in and for the County of New York, at Room 1530 of the Criminal Courts Building, No. 100 Centre Street, in the Borough of Manhattan, City and County of New York, on February 26, 1945, at 10 o'clock in the forenoon of that day, for the trial of said issue.

Enter.

Wm. H. Munson, J. S. C.

IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH S. FAY and JAMES BOVE, Defendants

DEFENDANTS' CHALLENGE TO SPECIAL JURY PANEL

Defendants, Joseph S. Fay and James Bove, hereby challenge the jury panel herein on the following grounds:

1. Said panel was drawn in violation of the method established for the drawing of jurors by Sections 590 and fol- [fol. 62] lowing of the Judiciary Law to the material prejudice of defendants in that the jurors were not drawn by lot as provided in Sections 615 and 618 thereof, but were drawn in purported compliance with Section 749-AA of the Judiciary Law by the method known as a special jury, which last named provisions of law defendants allege to be unconstitutional and void both on their face and as applied to the defendants in this prosecution. The reasons for this contention and for the contention that the drawing was prejudicial to the defendants will be hereinafter stated.

2. Section 749-AA of the Judiciary Law is unconstitutional and void both on its face and as applied to the defendants in this prosecution in that it is in conflict with the Constitution of the State of New York, Article 1, Sections 1 and 2 for the reasons hereinafter stated.

3. Section 749-AA of the Judiciary Law is unconstitutional and void both on its face and as applied to the defendants in this prosecution because it is in violation of the United States Constitution, Amendment 14, Section 1, in that it denies to defendants the equal protection of the laws for the reasons hereinafter stated.

4. Section 749-AA of the Judiciary Law is unconstitutional and void both on its face and as applied to the defendants in this prosecution because it is in violation of the United States Constitution, Amendment 14, Section 1, in that it violates due process of law.

5. Under Section 749-AA said jurors are selected from [fol. 63] jurors as provided in Sections 615 and 618. The selection is made by the County Clerk or his deputy or secretary upon personal examination as to the fitness of the

prospective special juror. No standards of any kind are prescribed by law to determine the manner in which such fitness is to be ascertained. In that respect the discretion vested in the County Clerk or his subordinate is unlimited and arbitrary, and Section 749-AA is therefore unconstitutional.

6. The list from which the special panel was drawn was prepared in violation of Judiciary Law Section 749-AA in that neither the County Clerk nor his deputy nor his secretary examined all of the persons on the general jury list not disqualified to serve as special jurors in order to ascertain the fitness of such general jurors to become special jurors, but examined only a small fraction of such general jurors and permitted unauthorized persons to determine that the great majority of general jurors not disqualified by law were unfit to serve as special jurors, thus in substance and effect placing the power of selection in the hands of persons not authorized by law to make such selection and permitting such persons to make such selection in an arbitrary and capricious manner.

7. In actual practice the selection of special jurors has been for the purpose of obtaining persons of conservative views, and for the purpose of excluding laborers and persons of humble station in life. These juries are popularly known as "Blue Ribbon" juries. It is well known that they represent the upper stratum of economic and social life in the [fol. 64] County of New York and that they have a greater tendency to convict defendants accused of crime than the jurors chosen from the general list.

8. The special jury panel selected for the trial of this indictment does not constitute a jury of and for the County of New York but constitutes a jury of only an arbitrarily selected number of assembly districts within said County of New York.

9. The special jury panel selected in this case was obtained by excluding from jury service all persons residing in those portions of the city largely inhabited by poor persons and by concentrating the selection of the jurors from assembly districts in which upper class persons largely reside, thus violating the principle that the jury must be selected from the people of the county at large and discrimi-

nating against the defendants in this case by reason of the nature of the same as more fully hereinafter set forth.

10. That the special jury panel selected for the trial of this indictment was chosen in such a manner as to obtain jurors who have certain definite and biased opinions in favor of capital in the relationship between capital and labor, thus making them unfit as special jurors and particularly unfit to sit in judgment in this case, in violation of defendants' rights to a fair and impartial trial.

11. That the ordering of a special jury panel in this case and the method of its selection destroy the foundations of the jury system as provided for under the Federal and State Constitutions and the laws otherwise applicable [fols. 65-67] thereto, and in violation of defendants' right to obtain an impartial jury.

12. The special jury panel selected in this case was obtained by excluding from jury service all persons who might be understanding of the point of view of the laboring man and by weighing the list heavily against defendants because of the preponderance on said special jury list and on the panel for this particular case of executives, bankers, brokers, real estate operators, retired business men, merchants and other persons of like character and by the virtual exclusion from said Jury list of trade union representatives, laboring people and women. This constitutes a discrimination in violation of the Constitution of the State of New York and of the United States against these defendants by reason of their class and economic interests.

Robert J. Fitzsimmons, and Thomas R. Fay, Attorneys for Joseph S. Fay, Office & P. O. Address, 654 Madison Avenue, Borough of Manhattan, City of New York.

Moses Polakoff, Attorney for James Bove, Office & P. O. Address, 475 Fifth Avenue, Borough of Manhattan, City of New York.

[fol. 68] EXTRACT FROM CLERK'S MINUTES

At a Trial Term Part One of the Supreme Court of the State of New York, (January 1945 Term continued) holden in and for the County of New York, in the First Judicial District of said State, for the trial of criminal actions, at the Criminal Courts Building in said County on Monday the 26th day of February, in the year of our Lord, one thousand nine hundred and forty-five.

Present: The Honorable William H. Munson, Justice of the Supreme Court of the State of New York.

Indictment filed May 17, 1943 in the Court of General Sessions and transferred to the Supreme Court by order dated March 15th, 1944.

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH S. FAY and JAMES BOVE

On trial for Conspiracy and Extortion, violation of Sections 580, 850 and 851 of the Penal Law

From a Special Panel of Jurors the following jury is balloted and sworn to well and truly try and a true verdict give according to the evidence, viz:

1—Edward L. Champion
2—Martin Ostriker
3—John F. Rachmar
[fol. 69] 4—Julius M. Schiff
5—Jacob J. Janzen
6—Thomas Glover
7—Joseph Dillon
8—Louise G. Harding.
9—Henry L. de Rham
10—Harry Norcross
11—Samuel C. Goodrich, Jr.
12—John A. Morgan

The following two alternates are balloted and sworn

1—Matthew B. McBride 2—Franklin Carty

March 9th, 1945. Court meets pursuant to adjournment. Present; as before.

People rest; Counsel for both defendants move for direct verdict for acquittal and to dismiss the indictment. Motion denied.

March 13th, 1945. Court meets pursuant to adjournment. Present, as before.

Both sides rest; Counsel for both defendants renew their motion for a directed verdict of acquittal and to dismiss the indictment. Motion is denied.

March 14th, 1945. Court meets pursuant to adjournment. Present, as before. Court charges Jury. Alternate Jurors discharged.

11.20 A. M. Jury retires to deliberate.

March 15th, 1945 at 2.45 A. M. Jury return to the Court, who upon their aforesaid oath do say that the said Joseph S. Fay and James Bove are guilty of the crime of Conspiracy as charged in the first Count of the Indictment and [fol. 70] guilty of Extortion as charged in the seventh count of the Indictment and further say that they are unable to agree upon a verdict as to the sixth count of the Indictment.

The Jury is polled and severally confirm their verdict.

Counsel reserve the right to make motions on day of sentence.

April 5th, 1945. Court meets pursuant to adjournment. Present, as before. Counsel for both defendants move to set aside the verdict and for arrest of judgment on various grounds. Motion denied.

Defendants are severally arraigned at the bar.

The District Attorney moves for judgment against both defendants.

It is thereupon demanded of the said Joseph S. Fay and James Bove what they hath to say why judgment should not be pronounced against them according to law, who nothing further saith unless as before they hath said.

Wherefore it is considered, ordered, and adjudged by the Court that the said Joseph S. Fay and James Bove for

the misdemeanor and felony aforesaid whereof they are convicted as aforesaid, be imprisoned in the New York County Penitentiary for one year and pay a fine of Five Hundred Dollars and one day for each Dollar of fine unpaid and be imprisoned in the States Prison at Ossining, New York for the term, the minimum of which shall be not less than seven years and six months and the maximum shall be not more than fifteen Years. The Penitentiary sentence to be served first: the sentence to States' Prison to follow.

A True Extract of the Minutes.

Archibald R. Watson, Clerk.

[fols. 71-78] In Supreme Court of New York, New York County, Criminal Term—Part I

[Same Title]

Statement of Testimony and Proceedings

Room 1530, Criminal Courts Building, New York, N. Y.

February 26, 1945.

Before Hon. William H. Munson, Justice

Appearances:

Frank S. Hogan, Esq., District Attorney of New York County; Sol Gelb, Esq., Joseph A. Sarafite, Esq., Assistant District Attorneys, Vincent A. G. O'Connor, Esq., Deputy Assistant District Attorney for the People.

Robert J. Fitzsimmons, Esq., 654 Madison Avenue, New York, Attorney for the defendant Fay.

Thomas R. Fay, Esq., Mineola, Long Island.

John J. McGeehan, Jr., Esq., Newark, New Jersey.

Moses Polakoff, Esq., 475 Fifth Avenue, New York, Attorney for the defendant Bove.

[fol. 79]

Room 1530,
Criminal Courts Building,
New York, N. Y.
Tuesday, February 27, 1945,
10:00 o'clock a. m.

Present Hon. William H. Munson, J. S. C.

DEFENDANTS' CHALLENGE OF JURY PANEL

(Both defendants were present. Trial continued. Same appearances.)

Mr. Fitzsimmons: May it please your Honor——.

The Court: May I have a copy of your challenge?

Mr. Fitzsimmons: Yes, your Honor, surely. I have the original here (handing paper to Court).

May it please your Honor, you have before you this morning the written challenge in behalf of the defendants Joseph S. Fay and James Bove, challenging the jury panel as it is presently drawn by order of this Court under yesterday's date.

The Court: What does the District Attorney's office say? Does he except to the challenge?

Mr. Hogan: It denies the grounds of the challenge.

The Court: You are excepting to the challenge?

Mr. Hogan: Yes.

The Court: Get that on the record—the exception of the District Attorney—all right.

Mr. Fitzsimmons: The challenge, as your Honor well knows by this time, is a written one, containing twelve [fol. 80] specifications, paragraphs or grounds on which we challenge this panel. At this time I wish to add a 13th ground, and as these papers become part of the record in the case, I will not read what is contained therein, aloud, but merely continue with my 13th, orally, if your Honor gives me that permission.

The Court: Well, you will have to file the 13th challenge in writing.

Mr. Fitzsimmons: Well, will your Honor give me the opportunity to file the same, say before four o'clock this afternoon or before ten tomorrow morning? This extra paragraph is caused by the publication in newspapers of certain matter that I take exception to and that I wish to become part of the challenge to the panel.

The Court: I don't think that is any ground for challenging the panel, under the Code of Criminal Procedure. I don't think you are entitled to argue a challenge to the panel unless you file it in writing before you start to argue.

Mr. Fitzsimmons: All right; I will offer my objection to these newspaper articles, under another motion.

The Court: I think that is proper. You can make a motion in regard to those articles, but I don't think it is proper now.

Mr. Fitzsimmons: I will do that. May it appear for the record that the written challenge, containing 12 paragraphs, stands as filed, and the evidence will be submitted on the same within the next few minutes, and then you will give [fol. 81] me an opportunity to make whatever motion I desire in respect to the newspaper articles, after the taking of evidence?

The Court: All right.

Mr. Fitzsimmons: Mr. McGurrin, will you take the stand, please?

Testimony on Challenge of Jury Panel

James McGurrin, called as a witness in behalf of the defendants, being first duly sworn, was examined and testified as follows:

(The witness stated that he resides at 60 Gramercy Park North, Manhattan, New York.)

Direct examination.

By Mr. Fitzsimmons:

Q. Mr. McGurrin, what is your official position?

A. Deputy County Clerk, in charge of the Division of Jurors, New York County.

Q. How long have you held that position?

A. Well, I have held it under the present title for five years, but before that I was Commissioner of Jurors. That was before the amalgamation of the County Clerk's office with that of the Commissioner of Jurors' office.

Q. And prior to that time had you rendered any public service to the community, in the line of having an official position?

A. Well, I have been eleven years in the same office, under different titles.

Q. Now, you are familiar, of course, with all the workings of the jury system as it presently exists in the County of New York?

A. Yes.

[fol. 82] Q. The jury system, as it is in the division of the County Clerk's office which you control, supplies jurors to all our courts in New York County, both civil and criminal; is that correct?

A. Yes.

Q. And how many classes of jurors are there?

A. Well, there are the petit or trial petit jurors, and regular trial jurors, and special jurors.

Q. Well, there are two classes——

A. Grand jurors and Sheriff's jurors.

Q. There are two classes, mainly, aren't there?

A. Mainly, yes.

Q. The special jurors and the general jurors?

A. Yes.

Q. That, is in relation to the men who are furnished to the various courts to sit in the trial of jury cases?

A. Yes.

Q. In addition to that, you have members of the Sheriff's jury, you say, and members of the grand jury?

A. Yes. Of course, they are not——

Q. How many general jurors are there in your office, whose names are on file in your office, New York County?

A. Oh, approximately about 60,000.

Q. And is that figure in accordance with the law as it is prescribed in the statute books, or by instructions received from the Appellate Division?

A. No, I wouldn't say that it is either, because there is no stipulated number, no prescribed number.

Q. Who fixes the amount at 60,000?

A. It is not fixed. I say we have approximately that many jurors.

Q. That is the fact, you have approximately 60,000 general jurors?

A. Approximately about 60,000 general jurors.

[fol. 83] Q. Out of the 60,000 general jurors, have you special jurors in addition to that number, or are the special jurors a part of the 60,000?

A. The special jurors are different and constitute a separate panel.

Q. And then would you say there are 57,000 general jurors and 3,000 special jurors, or 60,000 general and 3,000 special?

A. Oh, I would say approximately about 60,000 general jurors and about 3,000 or 3200 special jurors.

Q. Where do you select the special jurors from?

A. From those summoned to perform jury duty.

Q. And is every general juror a potential special juror?

A. Yes, every person summoned to the office is a potential special juror.

Q. Your whole system of operating the division of jurors of the County Clerk's office is guided, at least in part, by Section 749aa of the Judiciary Law; that is correct, isn't it?

A. Yes, that is correct.

Q. And in addition to the provisions set up in Section 749aa of the Judiciary Law, are there instructions that you receive from the Appellate Division, that guide you in your work of running the office and selecting jurors?

A. Well, what kind of instructions have you in mind?

Q. Well, are there general instructions received by you, as head of the division of jurors, relating to the selection of jurors, from the Justices in the Appellate Division?

A. Yes, there are general rules by which we are governed, yes.

Q. Are there any of those rules referring to the selection of special jurors?

A. Except as to the number, but then that is prescribed by law.

Q. I mean, what rules are there now, if any, which you received from the Appellate Division with respect to your [fol. 84] selection of special jurors?

A. There are really no rules, Mr. Fitzsimmons.

Q. There are no rules?

A. No.

Q. Doesn't the Appellate Division say to you that there shall be approximately 3,000 special jurors drawn?

A. Yes, but beyond that——

Q. Then, by their instructions, they guide you in——

A. As to the number.

Q. (Continuing:) —in setting up the number?

A. Yes.

Q. Now, do they guide you in anything else in the selection of these people, either rules or instructions?

A. None beyond those embodied in the questionnaire which is given to each prospective juror as he comes in.

Q. Your answer then is no, they don't send you any special instructions on the matter?

A. No.

Q. But their instructions are your—that is, the Appellate Division instructions are the instructions——

A. Oh, yes.

Q. (Continuing)—that guide you in setting up the questionnaire that you use in your office?

A. Yes.

Q. Now, I show you a sample copy of a questionnaire entitled "Qualifications to serve as a juror," and ask you to look at the same.

A. Yes; I have one here.

Q. All right, Mr. McGurrin, I will accept your copy instead.

A. Yes.

Mr. Fitzsimmons: May I offer that in evidence and ask that it be marked in evidence?

Mr. Hogan: No objection.

(Paper received in evidence and marked Defendants' Exhibit D-1, of this date.)

[fol. 85] Q. Now, Mr. McGurrin, tell us, if you will, how you go about getting jurors, whether they be general jurors or special jurors, down to the office. Where do you select them from, in the beginning?

A. Oh, they are taken from different sources, but mainly the voting registration lists.

Q. In other words, you first consult the voting registration lists of the County of New York?

A. Yes; that is the most prolific source of jurors.

Q. And I take it that you do not confine your attention to the persons affiliated with one party or the other?

A. No.

Q. You take them all?

A. That is true.

Q. In addition to consulting the voting lists, what other sources do you tap in order to get these jurors?

A. Use the telephone directory.

Q. What else?

A. Well, that would be about all. Of course, we have lists sent to us occasionally from different groups, especially in the selection of women, for example. We solicit those lists, because under the present law a woman is not obliged to serve on a jury. The League of Women Voters, for example, have sent us lists of prospective women.

Q. You say you solicit from various organizations. What do you mean by "soliciting"? Do you write letters to them and ask them to send you lists?

A. No, no. It is—for example, I have addressed some of these groups, and the vast—those women who are civic conscious—invited them to come to the office and make out one of those questionnaires and serve.

Q. Now, do you solicit any group that furnishes the names of any jurors, male jurors, who are later on selected for jury service?

A. No, no, we do not.

[fol. 86] Q. Am I correct then when I say that the only source from which you get the male jurors is from the voting lists and the telephone director?

A. Substantially, that is correct.

Q. No other sources?

A. No other sources.

Q. Now, when a man or a woman appears at your office, what brings them there? A letter that you send them first?

A. Yes. It is really a notice. It is an official notice, asking him to appear at the office to enable us to pass on his qualifications as a juror.

Q. Now, when he or she arrives at your office, do you give them a questionnaire similar in all respect to Defendants' Exhibit D-1 in evidence?

A. Yes.

Q. And does he or she fill it out at your office, or may they take it away if they so desire and fill it out at home and return it?

A. No, it must be made out at the office.

Q. All persons receiving these letters then, who get the questionnaire must fill out the questionnaire in your office; is that right?

A. Yes, that is correct.

Q. It can't be taken out of the office and mailed in?

A. It may not be taken out of the office or mailed in.

Q. Suppose someone other than the person to whom the letter is addressed comes down in answer to that letter and requests a questionnaire to take to the person who is addressed in the letter; would you give him one, to be taken out of the office?

A. No.

Q. Now, on this questionnaire there are some 24 questions concerning the person who fills this out; is that correct?

A. Yes.

Q. And I presume that the person who fills it out does so himself or herself?

A. That is correct, yes.

[fol. 87] Q. And if he or she is unable to do it, there are clerks there to assist that person; is that right—clerks in your office?

A. Not to assist in making it out, no. The person must fill it out himself or herself, because really this is also an intelligence test.

Q. Yes; but if a person needs any help or any aid in filling this questionnaire out, they may apply to any of the folks in your office who are there for that purpose?

Mr. Hogan: I object to that as already answered, your Honor. The witness has testified——

The Court: Overruled.

Mr. Hogan (continuing): —that the person must make it out himself.

By the Court:

Q. Is that your answer, Mr. McGurrin: A person must make it out himself?

A. No. An appeal for help might imply that the person does not understand the phraseology of the questionnaire.

By Mr. Fitzsimmons:

Q. Well, would an appeal be heeded and would that clerk in your office aid the person in filling it out?

A. No.

Q. Now, after the questionnaire is filled out, what is done with it?

A. The prospective juror is escorted to the desk of one of three examiners, and the examiner examines the questionnaire and perhaps asks some supplementary questions, and the person is accepted or rejected, based on that per-

son's degree of intelligence as revealed by the question-
[fol. 88] naire which he or she has made out.

Q. Now, all the persons that come down in response to a letter from you to qualify, are not thereupon accepted, are they?

A. Oh, no.

Q. There are some people rejected, aren't there?

A. There are many rejected, yes.

Q. And in being rejected, that means they do not have to serve as jurors?

A. They don't have to serve, no.

Q. But if a person is accepted, then he becomes a general juror; is that true?

A. That is true, yes.

Q. And he becomes one of the 60,000 that you have on record down there?

A. That is right.

Q. Now, these clerks that you talked about, you stated a moment ago that when the clerks talk to the person who fills out the questionnaire they ask them certain questions in addition to the questions on the form. You said, that, did you not?

A. Yes, sometimes that is done, yes.

Q. What question do they ask these prospective jurors, in addition to those questions that are on the form?

A. Well, that would be in the case where, for example, an answer is omitted, you know—where the "Yes" is left out, or the "No" is left out, or the question—property qualification is blank, or matters—discrepancies of that kind.

Q. In other words, the questions that you are now telling us about, that might be asked by these clerks in your office, would have to do with questions not answered on this questionnaire?

A. Quite true, yes.

Q. What do you call the clerks that meet these persons who come down to your office?

A. They are examiners.

[fol. 89] Q. Examiners?

A. Yes.

Q. And how many examiners have you in your office?

A. Three.

Q. And may we have their names?

A. Theodore Schumann, Frederick Sottong, and Walter J. Cullinan.

Q. Now, do you give any instructions to these three examiners, with respect to their calling to your attention any questionnaires that might be filled out by people whom you later accept as special jurors?

A. Yes.

Q. What instructions do you give to these three examining clerks?

A. Well, for example, a man or a woman whose intelligence and mental alertness has been established to some extent by the replies he has given on the questionnaire, particularly his answer to that question regarding capital punishment.

Q. What number is that?

A. That is an amplification of No. 20: "Have you such views concerning the death penalty as would prevent you from finding a defendant guilty of a crime charged, if punishable by death?"

Also 21: "Do you doubt your ability to lay aside opinions or impressions as the result of newspaper reading or hearsay, and render an impartial verdict upon the evidence?"

Q. What particular instructions do you give to these examining clerks, with reference to people——

A. Then I should add, there is another question, 23: "What months of the year between October 1st and June 30th would you prefer to serve?" In other words, jurors are given the option of selecting two months of the jury year.

Q. There is nothing about question 24 that would demonstrate a man's intelligence or lack of it, is there?

A. No. 24?

[fol. 90] Q. It is the one that has to do with what month he wants to serve in?

Mr. Hogan: That is the 23rd.

The Witness: 23rd, yes.

A. No; but it would have a good deal to do with his acceptance or rejection as a prospective special juror.

Q. Would you say, as to questions 20, 21, 22, and 24, that an answer either way to any one of those questions would in any way demonstrate the education or intelligence of a juror, or lack of it?

A. Not exactly education.

The Court: Just a moment, what has his opinion got to do with the irregularity of this system?

Mr. Fitzsimmons: I will come to that in a moment. He stated to me that they look for——

The Court: The question speaks for itself, doesn't it?

Mr. Fitzsimmons: It does, surely.

The Court: The question here is whether any irregularity exists on the drawing of this panel, that is all.

Mr. Fitzsimmons: I am getting down to that, but I am laying a foundation for——

The Court: His opinion has nothing to do with the regularity of the proceedings.

Mr. Fitzsimmons: Oh, no, not at all.

The Court: Go on.

Q. You stated now that you tell these examining clerks of yours to be on the lookout for men who display intelligence. Is that what you told me a few minutes ago?

[fol. 91] A. Or women, yes. Of course, that——

Q. Women?

A. Yes.

Q. Who might be prospective special jurors; is that right?

A. Well, the intelligence would apply to all jurors, but their answers to these questions would naturally influence the examining clerk to bring that person to me as a prospective special juror.

Q. In other words, you say that, for instance, taking question 20—that an answer to question 20 would influence a clerk in bringing or not bringing to you a juror who might be considered by you as a special juror; is that right?

A. Yes.

Q. Whether or not he was in bankruptcy before; is that right?

A. No. They go to the other line, the line following that.

Mr. Hogan: Your Honor, I object to that. This is definitely not what the witness testified to. You are confusing, Mr. Fitzsimmons, what is on the left with respect to question 20 and what is on the right.

Mr. Fitzsimmons: Question 20 is——

Mr. Hogan: Will you read question 20 to us then?

Mr. Fitzsimmons: May he, your Honor?

The Witness: The first part of 20 is relevant, as far as we are concerned, but the second part, to the right——

Mr. Fitzsimmons: Well, on the first part of it—that was the question I asked you—having to do with whether or not the man was bankrupt.

Mr. Hogan: I object to that, your Honor.

Mr. Fitzsimmons: Yes or no.

[fol. 92] A. No, that would not have anything to do with it.

Mr. Hogan: That was not the question asked or the question answered.

The Court: Let us start over again. Frame another question. Sustained. May I have a copy of one of these questionnaires? Have you an extra one?

Mr. Fitzsimmons: I think we have one, your Honor.

The Witness: You may look at this one, your Honor.

The Court: All right.

The Witness: Mr. Kane, I think you have the form for females, I believe.

(Paper handed to witness.)

The Witness: That is all right.

Q. I refer you now to the last half of question 20: "Have you such views concerning the death penalty as would prevent you from finding a defendant guilty if the crime charged be punishable by death?" That calls for a statement of opinion on behalf of the person that fills out and answers that question?

A. Yes.

Q. That is right, isn't it?

A. Yes.

Q. And you say that regardless of how he answers it, that has to do with determining his intelligence?

A. No.

Q. Am I right in that or am I wrong?

A. No, you are wrong. Not so much intelligence as, in this case, whether he would qualify as a special juror.

Q. Looking then at both the first half and the second half—if there be halves to these questions, and there apparently are here—21, 22 and 23; do you say now that as to [fol. 93] those questions you judge the intelligence of jurors and the answers they give to them? Yes or no.

A. Yes, on 23 I would say, particularly. 23 particularly, but the answers, of course, to every question on this questionnaire are intended to test the intelligence of a prospective juror.

Q. All right. Now, you have down in your office this questionnaire filled out; do you give any instructions to these examining clerks as to their doing anything with the questionnaires, with respect to the applicants or people who fill out these questionnaires being considered as special jurors?

A. Yes.

Q. Now, what are the instructions that you give, if any, to these examining clerks, with regard to prospective special jurors?

A. Well, the instructions are that a prospective juror who has answered all these questions satisfactorily, showing a certain degree of intelligence by the answers that he has made, providing that that person is available for service any time, any month of the year, such a person is a prospective special juror.

Q. Well, you told me at the start that everyone whose questionnaire is accepted and becomes a general juror is a prospective special juror. That is correct?

Mr. Hogan: Potential.

Q. (Continuing:) Or a potential special juror.

A. I don't think that is quite correct. I said every juror summoned to the office is a potential—is a potential special juror, yes. But then——

Q. Now, I will put it this way: On your present list down at the office you have 3,000 special jurors.

A. How many?

[fol. 94]. Q. 3,000.

A. Yes.

Q. Approximately 3,000?

A. Approximately 3,000, yes.

Q. How do you select those men and women to be special jurors, over all the rest of the people that came down there and filled out these applications and questionnaires?

A. Well, I think I have already indicated. First of all—and this is really the most important consideration, since virtually nine jurors of every ten coming to the office will select two months of the year to serve—now, of course, they are not considered as prospective special jurors, because they avail themselves of that provision of the law or the rules to select those two months. In other words, a special juror must be available to serve at all times. A special

juror may have no conscientious scruples respecting the imposition of the death penalty, and must also have an open mind with respect to circumstantial evidence. Those are the three fundamental considerations.

Q. How many prospective jurors of any class are examined each day, on an average, in your office?

A. How many altogether?

Q. Yes.

A. Oh, on an average, probably—oh, around a hundred—120, I would say.

Q. And out of the 120 you say that about 90 per cent of those 120 indicate that they can serve only one or two months during the year?

A. Yes. That is quite true.

Q. Immediately upon their saying that in their questionnaire, these examining clerks cast them aside as special jurors; is that right?

A. Yes. Yes, that is true.

Q. In other words, they eliminate them from becoming special jurors?

A. Yes.

[fol. 95] Q. Now, assuming that a person indicates he is available for jury service any time that he might be called, and he fills in an answer, whatever that answer might be, to all the other questions on the questionnaire; what happens then with respect to the possibility of his becoming a special juror?

A. Well, he is a prospective special juror, yes.

Q. Now, what if anything do these examining clerks do with regard to that person's becoming a special juror?

A. That person is brought before me or Mr. Kane for further examination.

Q. You say "further examination." Does the examining clerk ask him any questions in addition to those questions on the questionnaire?

A. No.

Q. Asks him none at all?

A. Oh, he might ask him questions amplifying his answers, but that wouldn't—I wouldn't say he answers nothing beyond the questionnaire.

Q. And he brings him to you?

A. Yes.

Q. Or Mr. Kane. And then what happens? Do you ask questions?

A. Yes, we—well, I usually ask a man what his——

Q. Let me interrupt you for a moment—excuse me—let me interrupt your answer to that question, and ask you to tell me, if you will, what conversation you carry on with the examination clerk who takes to you prospective special jurors?

A. None at all. No—the prospective juror——

Q. Well, does he say something to you when he brings this man or woman over?

A. Oh, nothing beyond saying that, "Perhaps, you would like to interview this gentleman as a prospective special juror," or "this woman."

Q. That is all?

A. Or "this woman." That is all.

[fol. 96] Q. And what questions do you ask if any, in this interview?

A. Oh, I might ask him some questions amplifying or supplementing that second part of 20 and of 21, following that up with something about his business experience, for example, his general education; and, first of all, try to determine, as a result of his answers, whether this man is fair-minded, whether he has an open mind on all things, no prejudices of any kind. In other words, to test his fitness, his intelligence, his objectivity as a juror.

Q. Do you generally ask all those questions of all the people that you interview with regard to their becoming special jurors or their possibility of becoming special jurors?

A. Yes, in a general way, yes.

Q. And do you have those——

A. They might not be framed in the same way.

Q. Generally, substantially, they amount to the same?

A. They amount to the same.

Q. And do you have a form written out there, to guide you, in questions that you put to these people?

A. No, no form. I have the questionnaire before me, which they——

Q. These questions which you put to the prospective juror who might or might not become a special juror, are they questions that you conceive in your own mind?

A. They are,—no, they are questions suggested by the questions on the form which he has filled out and which I have before me as I am talking to him.

Q. The questions that you ask are suggested to you by the questions that appear on the questionnaire; is that right?

A. That is right, yes.

Q. And you receive no instructions about what questions to ask those prospective jurors?

A. No.

[fol. 97] Q. You do that because you make up in your own mind that the questions you ask will be—would help you to enable you to determine whether or not you should accept any of these persons as special jurors?

A. That is correct.

Q. Is that right?

A. That is right.

Q. You are the sole judge of that?

A. Yes.

Q. Now, you do not give any particular instructions, I take it, to, say Mr. Kane, who also examines general jurors, on whether or not they may become special jurors, do you?

A. No. I think Mr. Kane is eminently qualified to act, without any instructions. He has had a lot of experience.

Q. Well, I admit that, Mr. McGurrin; but the question is: You do not give him any instructions along those lines?

A. No.

Q. In other words, he too puts questions to those jurors, as they come to his mind?

A. Yes.

Q. Supplementing the questions that appear on the questionnaire. And from the answers given to those questions, he makes up his mind whether or not to accept those people as special jurors or not; is that right?

A. Yes, yes.

Q. No rules from the Appellate Division on that subject, is that right?

A. Yes.

Q. No instructions come down from the Appellate Division on that score?

A. No, no.

Q. No provisions are contained, along those lines, in Section 749aa of the Judiciary Law; is that right?

A. Right.

Mr. Hogan: I think, your Honor, that the section of the law is the best answer to that.

The Court: Yes, that speaks for itself.

Mr. Hogan: I object to the question and ask that the [fol. 98] question and answer be withdrawn.

The Court: Well——

Q. Now, you told me, when you first took the stand, Mr. McGurrin, that from the general jurors down in your office—that is, the list of general jurors down in your office of 57,000 and the list of special jurors of approximately 3,000, that you have a list of grand jurors down there. About how many grand jurors are there?

A. About 1150, I would say, at the present time.

Q. Are they a separate list from the other two that I referred to?

A. Yes, it is a separate list, yes.

Q. And in addition there is a fourth list known as the Sheriff's jury panel?

A. That is a separate list, yes.

Q. And about how many of them are there?

A. About 400 altogether.

Q. Tell me, Mr. McGurrin, do any of these names on the grand jurors' list ever become part of the names that make up the special list here?

A. Oh, No. When a person becomes a grand juror, his name is removed from all other lists.

The Court: You mean a special juror?

The Witness: Oh, yes. Mr. Fitzsimmons is talking about grand jurors. Didn't you talk about grand——

The Court: He asked if a grand juror ever appeared on a special panel.

The Witness: No.

Q. In other words, if a man's name were on a special jurors' list, and he later became a grand juror, his name [fol. 99] would be removed from the special jury list?

A. That is true, yes.

By the Court:

Q. The law provides for that, doesn't it, Mr. McGurrin?

A. Yes.

Q. He is exempt from all other service?

A. Exempt from all other service in the State courts, yes.

By Mr. Fitzsimmons:

Q. Now, one of the questions on this questionnaire—and you are more familiar with it than I am—asks the question of every applicant here as to whether or not he ever served as a grand juror. That is correct, isn't it?

A. Yes.

Q. What numbered question is that?

A. "Ever served as a juror."

Q. What number is that, please?

A. 14, to the right.

Q. Yes.

A. That covers everything.

Q. In answering that question No. 14 or that part of 14 which asks whether or not the applicant ever served as a juror, many people put down, "Yes, served as a grand juror"; that is correct, isn't it? Some people put that down?

A. I don't—no, I don't think that would happen, because that would imply that we summoned grand jurors for further examination to the office. That doesn't happen.

Q. No, not what my question implies, Mr. McGurrin; does it ever occur that any persons who fill out this questionnaire say, in answer to that question, "Yes, I served as a grand juror"?

A. Yes, but in the Federal Court.

Q. Yes.

A. Yes.

[fol. 100] Q. In other words, you could be a grand juror in other courts, other than those in the County of New York; is that right?

A. Yes.

Q. You might be a Federal Grand Juror?

A. Yes.

Q. The answer to that question in the affirmative that a man either is serving as a grand juror in the Federal Court or already served as a grand juror does not disqualify him in any fashion, does it, to take him or keep him on the regular jury list, would it not?

A. No, it would not influence us either way, no.

Q. You would give consideration to it, is that right?

A. No, I don't think so.

Q. Wouldn't you give consideration to the answer I might as to whether to take him on or put him off?

A. On the special jury?

Q. Yes.

A. No.

Q. Now, do you know, Mr. McGurrin, how many persons serving on your special juror list down there have had previous grand jury service? Do you know that?

A. A very few.

Q. Very few?

A. There might be a few, yes.

Q. Do you want to give us an estimate on how many, offhand?

A. No, I would rather not, because—that would involve a check of the grand—of the Federal Grand Jury list.

Q. I beg your pardon?

A. I would have to check that with the Federal Court, to ascertain whether our special juror was a Federal grand juror or not.

Q. Well, if he was a Federal grand juror, you wouldn't allow him to serve as a special juror; is that it? Or would you?

A. No; we would allow him to serve.

Q. You would allow him to serve?

A. Yes, if he were on them.

[fol. 101] Q. Did you give me the estimate as to how many persons on the special jury list have had grand jury service?

Mr. Hogan: I object to that.

The Court: Sustained. He said he could not do it, without a check.

Q. If you did make a check, where would you make the check from?

A. We would have to check with the jury clerk in the Federal Court.

Q. So I mean as to giving me the number of men who serve on your regular or special juries, who have had grand jury service, where would you check that fact if you did make a check?

A. It is that we check with our questionnaires on file.

Q. Your own records?

A. Yes.

Q. In other words, by going through the 3,000 names and looking at each questionnaire, you could then give me an exact answer as to how many?

A. No, it would not be exact, because some of those might have qualified as Federal Grand Jurors since the questionnaire was made out, you see.

Q. Well, it would be a pretty fair estimate, wouldn't it?

A. Yes.

Q. Now, every juror who is accepted as a general juror and does general jury service in whatever court he may be called, fills out the exact same questionnaire marked Defendants' Exhibit D-1, as the man who is later accepted as a special juror?

A. Yes.

Q. Is that right?

A. Right.

Q. Now, I presume that when you read one of these questionnaires after a person fills it out, in your mind he has [fol. 102] answered it or filled it out either satisfactorily or unsatisfactorily; is that right? In your opinion?

A. Yes. Of course, if there are glaring errors in the questionnaire, he is not accepted at all as a juror to serve anywhere.

Q. Well, for instance, if he answered the second half of question 20 that he had such views concerning the death penalty that prevented him from serving on a jury in a murder case; would you reject him entirely for all jury service?

A. Oh, yes.

Q. Or would you take him for some service in the civil courts?

A. Oh, no; he would be accepted as a regular trial juror.

Q. Yes.

A. But that would eliminate him as a special juror.

Q. In other words, you would not send him around to a part of the criminal court where they were trying murder cases, is that right? If he was opposed to the imposition of capital punishment?

A. As a trial juror?

Q. Yes. Or would you? A. No. If we could avoid it, we would not, no.

By the Court:

Q. You don't send him around anywhere, do you?

A. No, your Honor.

By Mr. Fitzsimons:

Q. What is your opinion generally of whether a person answers a questionnaire satisfactorily or unsatisfactorily?

Mr. Hogan: I object to the question.

The Court: Sustained.

Mr. Fitzsimmons: Exception.

[fol. 103] Q. Now, what was the number you gave me as the number of people who visit your office each day, in answer to letters calling them down to qualify as jurors?

A. Well, on an average, probably about 120-125.

Q. That was the group that you told us about, that 90 per cent of them designate particular months in the year in which they can serve; is that right?

A. Substantially, that is.

Q. Now, in the average day how many people are brought to you by these examining clerks, who say to you, "Mr. McGurrin, here is a prospective special juror?" How many times does that happen in the average day? In the average day—average week, if that will do you any——

A. A week would be better.

Q. A week would be better, yes.

A. About three or four during the week.

Q. So that it is fair to say that every week that you are in the office approximately four people are brought to you by these examining clerks, who introduce them to you as people who might be special jurors?

A. Yes.

Q. Then in the course of a month I would say that average would be about 20; is that right?

A. Yes.

Q. Would you give us an estimate then of about how [illegible] al jurors and how [illegible]

[illegible] ly speaking, 90 to [illegible]

[illegible]

A. I would say so, yes.

Q. And some examinations of these [illegible] ersons are lengthy [illegible] s that right?

A. Yes, they are lengthy; [illegible] hy in any case.

A. No, they are not lengthy. Not long [illegible] say one or two [illegible]

[fol. 104] Q. You dispose of them in [illegible]

A. A cursory examination.

Q. In other words, you rely mainly upon the way the examining clerk views the person; is that right?

A. Yes.

Q. That is right, isn't it?

A. Yes, that is right.

Q. Now, does the law require the County Clerk or his deputy to examine all those filing questionnaires, for qualifications as jurors?

A. You mean for special jurors?

Q. Any kind of jury duty.

A. No, the law does not require the deputy to examine all jurors, if that is what you mean, Mr. Fitzsimmons, no.

Q. Well, but the law does require the County Clerk or his deputy to examine all special jurors; is that right?

A. Yes.

By the Court:

Q. Is that a question for him to determine?

A. Yes.

Mr. Fitzsimmons: Yes, I believe it is. He is the one who administers the law.

The Court: I don't think it is, on this question before the Court. This is a question of whether or not the County Clerk has complied with the requirements of the statute. That is all we are interested in, not what he construes the law to be or what his opinion is as to the statute.

Mr. Fitzsimmons: Well, that would determine what he did.

[fol. 105] The Court: Well, what he did is a different thing from what he thinks about the law. Go ahead.

Mr. Fitzsimmons: I am asking along the lines of what is actually done, more than anything else.

The Court: Go ahead.

By Mr. Fitzsimmons:

Q. Now, in selecting persons as special jurors, do you consider their age at all?

A. No. That is provided by law.

Q. No, not what is provided by law now; do you consider their age as it appears on the questionnaire? In other words, do you accept more older men than younger men, or do you disregard age entirely?

A. Well, not extremely young men, no. For example, we hesitate to——

Q. I didn't hear that.

A. We would hesitate to accept a man of 22 years of age, for example.

Q. As a special juror?

A. Yes.

Q. Where do you draw the line as to age?

A. Well, I would put it another way; that all jurors, exercising our own judgment, we prefer people who are at least over 25 years of age.

Q. Well, would you say you have more special jurors between the age bracket 25 to 30 than you have over 35?

A. No.

Mr. Hogan: I object to it, your Honor, unless the witness can tell us that he has made an examination of the list, with respect to age.

The Court: His ultimate answer was "No." Is that correct?

The Witness: Yes.

[fol. 106] Q. In other words, there are more persons over the age of 35 than under the age of 35 serving as special jurors?

A. Yes, that is correct.

Q. So that you favor—it is a fair conclusion then to come to when I say that you favor older men for that type of service?

A. Yes, and also as trial jurors.

Q. Now, do you consider education as a factor?

A. Yes.

Q. And by education do you determine education by college degrees received, or do you use some other standard to gauge education?

A. No, no. We would not be influenced by the fact that a man had a college degree or was a university graduate.

Q. But you do consider a man's educational background?

A. Oh, yes.

Q. In determining whether or not to accept him as a special juror?

A. Yes, or as a trial juror.

Q. Or as a trial juror?

A. As a petit juror, yes.

Q. Now, would you say most of your special jurors down there are college men with degrees, or no?

A. No.

Q. Now, do you consider a man's or a person's occupation, with respect to whether or not you are going to accept him as a special juror?

A. No.

Q. Not at all?

A. No.

Q. In other words, it is fair to say then that making up your mind whether or not to accept the person who fills out a questionnaire, you don't bother to look at what occupation he has?

A. Oh, yes, we look at it, but we are not influenced by what his occupation is, in making the selection.

[fol. 107] Q. Now, Mr. McGurrin, will you tell us how many laborers you have on that special jury list down there?

Mr. Hogan: I object to it, your Honor.

The Court: Sustained.

Mr. Fitzsimmons: Exception.

Q. Have you made an examination of the special jury list with respect to the occupations of all those named thereon?

A. You mean in order to determine how many laborers?

Q. No, no, for any purpose?

A. No.

Q. You have never done that?

A. No.

Q. For any purpose?

A. No.

Q. Are you in a position to tell us how many laborers there are on the jury panel?

Mr. Hogan: The same objection, your Honor.

The Court: Well, I sustained the objection to it. He can't tell us, if he wants to.

Q. In making up your mind whether or not to accept a person as a special juror, do you consider his residence?

A. No, as long as——

Q. Not at all?

A. As long as he lives in the County of New York.

Mr. Hogan: What was the answer?

The Witness: As long as he lives in New York County.

Q. If I were to ask you—in order to shorten this inquiry—as to about how many persons of different occupations there were among the 3,000 special juors you have there, would you be in any position to give us a fair answer?

[fol. 108] Mr. Hogan: I object to the question.

The Court: Sustained.

Mr. Fitzsimmons: Exception.

Q. Have you ever made an examination of the special jury list down there, to determine the occupations of all the 3,000 persons who are on it?

Mr. Hogan: I object to that, as already answered.

The Court: Sustained.

Mr. Fitzsimmons: Exception.

Q. Now, on residence, do you know how many special jurors come from that part of the city known as Harlem, more particularly north of 110th Street and south of 155th Street, and between Park Avenue and Eighth Avenue?

Mr. Hogan: Your Honor, I object to the form of the question.

The Court: Sustained.

Mr. Fitzsimmons: Exception. May I ask your Honor whether it was sustained as to form?

The Court: It is sustained because I think your inquiry should be limited to whether or not the County Clerks complied with the requirements of the statute. We are not concerned with where the jurors live, what street they live on, or what their occupations are. That has been the reason for my rulings in the past.

Mr. Fitzsimmons: May I respectfully be given an opportunity to discuss that with your Honor?

[fol. 109] The Court: Yes, you can discuss that during the noon hour.

Mr. Fitzsimmons: You would rather have it in chambers, would you?

The Court: No, I would just as soon have it here, but I think we are wasting a lot of time. Go ahead. I will hear you.

Mr. Fitzsimmons: I was going to say that your Honor said that my inquiry should concern itself about whether

or not the County Clerk carried out the provisions set up in the law in selecting special juors. Now, assuming—I am not saying Mr. Gurrin or any of his County Clerks did that—but assuming for the sake of argument that he did select all the jurors on the special panel from one part of the city; that would clearly be, to my mind at least, indicative of the fact that he was not conducting the office along the lines that the law provides; so, hence I asked that question. I am not now going to run all over the city in the various parts; I just pick one or two spots and get his answer on it. Now, I did not mean to use delaying tactics along these lines, but I did want to ask him one or two questions on one or two sections of the city and see what his answers were.

The Court: Go right ahead and ask him, and I will pass on them, and if I think you are entitled to get them in, I will rule with you.

Mr. Fitzsmmons: All right.

Q. Now, Mr. McGurrin, how many jurors, special jurors, would you say come from that section of the city——

[fol. 110] Mr. Hogan: Objection.

The Court: He has not finished.

Mr. Hogan: I thought you were.

Q. (Continuing:) —north of 110th Street, south of 155th Street, and bounded on the east by say Park Avenue, and on the west by Eighth Avenue?

Mr. Hogan: Objection.

By the Court:

Q. Do you know how many?

A. No.

By Mr. Fitzsimmons:

Q. And if I asked you the same question with reference to any other parts of the city that are known familiarly by names as Yorkville or West Side, Lower East Side, would your answer be the same?

A. It would be the same, yes.

Q. I take it then that you never made an examination of the—or did you ever make an examination of the 3,000 names on your special jury list, with respect to the localities of the various names thereon?

A. To that question, Mr. Fitzsimmons, I must repeat what I testified in a similar case before: It was a matter of supreme indifference to us if the 3,000 special jurors lived in one block, or even in one apartment house. We are not concerned at all with the geographical basis.

Q. Are you in any position to tell us how many general jurors come from any particular locality in the city?

A. No.

Q. How many people of the colored race are there as special jurors, on your present list?

[fol. 111] Mr. Hogan: I object, your Honor.

The Court: If he knows, he may state.

A. I will say approximately between forty and fifty.

Q. Forty and fifty, out of 3,000?

A. Yes.

Q. How many colored folks are on the general jury list of 57,000, if you are in a position to tell us?

A. That I could not say, but I know there are several thousand on there.

Q. There are many times more, are there not, in proportion to the forty or fifty who are on the special jury list?

A. Yes, that is true.

Q. Now, when your special examiner takes a prospective special juror to you, do you make any record of what you ask him and what he answers to the questions that you ask?

A. No.

Q. Do you make any record of it?

A. No.

Q. After Judge Munson ordered the drawing of 300 jurors for this trial, you presided at the drawing, did you not—or you were present at the drawing?

A. Yes, sir.

Q. And after a drawing is made, you list the names and addresses of the special jurors drawn, do you not?

A. Yes.

Q. After they are drawn from the wheel?

A. Yes.

Q. Now, you looked over the names of the 300 that appeared in the special panel called in this case, did you not?

A. No. I drew the ballots, but I can't say that I looked over the names or addresses. They were afterwards recorded by the clerks, and a copy was furnished to you or——

Q. Do you recall interviewing any of those persons who appear on this number of 300 who were called in this case? [fol. 112] A. Well, I didn't examine the panel, to begin with, so I wouldn't know. Probably if I saw the——

Q. Keep your voice up just a little bit; I have difficulty.

A. I say, if I went over the list of 300 drawn I might possibly recognize some of them.

Q. Well, did you go over the list?

A. No.

Q. Now, in each case when a prospective special juror is brought to you by the examining clerk, he has already been interviewed by the examining clerk?

A. Yes.

Q. How often do you revise that special jury list, Mr. McGurrin?

Mr. Hogan: Are you in a position to tell us that?

A. It is being revised constantly, all the time.

Q. In what way?

A. Checking up on addresses, particularly, and physical disability.

Q. Is the revision that you speak of made when a juror or prospective juror's name is drawn from the special panel in a case, and notice sent to him, and notice is returned that the juror is dead or moved?

A. No.

Q. Is that the type of revision you speak of, or do you make independent investigation?

A. No; we are constantly making revisions, to determine whether the juror is alive and in good health and residing in the county.

Q. What do you do, to determine that?

A. We send out a form containing space for his address, and, if he has moved, to furnish his new address.

Q. What does the form say to him? Does it ask him to come down again?

A. Oh, no.

Q. Merely asks him where he lives now?

A. Asks him where he lives now. He mails it in and has it notarized on the outside.

[fol. 113] Q. That is the only question that you ask him?
A. That is the only question, yes.
Q. Do you do that with the general duty list, too?
A. Yes.
Q. Do you know how many women are on this list of 3,000 special jurors at the present time?
A. I could not say exactly, but I know there are certainly about twenty or twenty-five anyway, or more.
Q. Say tops twenty-five out of 3,000.
A. About that.
Q. How many women do you have making up the general jury list?
A. Oh, I would say we have about seven or eight thousand women.
Q. Would you raise that to about twenty, on second consideration?
A. No, no.
Q. Still remains——
A. 20,000 women?
Q. Yes.
A. Oh, no. No, we haven't anything like that.
Q. You don't use that many as special jurors?

Mr. Hogan: General.
Mr. Fitzsimmons: As general jurors, I mean.

A. No, not 20,000.
Q. What is your estimate?

The Court: Seven or eight, he said.

Q. Seven or eight thousand, is that right?
A. Yes; but that is an estimate, of course.

By Mr. Polakoff:

Q. Mr. McGurrin, have you given us the only method by which special jurors are selected?
A. What method?
[fol. 114] Q. Is that the only method, the one you stated, by which special jurors are selected?
A. That is substantially the method by which they are selected, yes.
Q. Are any jurors ever recommended to you as special jurors?

A. No.

Q. By any body, public or civic?

A. No.

Q. The questionnaire, Defendants' Exhibit D-1, is the sole questionnaire that is submitted to all jurors, both regular and special; is that right?

A. Correct, yes.

Q. And the law prescribing the qualifications of special jurors is covered in questions 20 to 24, inclusive; is that right?

A. Yes.

Q. Now, out of the 60,000 jurors on the regular panel, how many of those jurors have answered any of the questions 20 to 24, inclusive, that were disqualified as special jurors?

Mr. Hogan: If he knows.

A. I could not answer that.

Q. Would you say that the great majority have answered that in such a way that they could qualify as special jurors?

A. Well, I would rather not answer, because I couldn't speak with authority on it.

Q. Haven't you previously answered that question, Mr. McGurrin?

Mr. Hogan: You mean——

A. Am I to infer from the—you mean question No. 20, views concerning the death penalty, or——

Q. Yes. Any one of those four questions which are questions directed towards the qualifications of special jurors. Out of your regular panel of 60,000 approximately how [fol. 115] many people have disqualified themselves from becoming special jurors, by adversely answering those questions?

A. Oh, I would say probably 90 per cent, especially that question 23, "What months of the year between October 1st would you prefer to serve?"

Q. Well, what does it say thereafter?

A. "What months of the year between October 1st and June 30th, would you prefer to serve? Name two or more months."

Q. And by naming two they disqualify themselves?

A. Yes.

Q. After you direct them to name two months—after your questionnaire directs them to name two months or more, you say by naming two months and giving a preference of the months during which they want to serve, that they thereby become disqualified as special jurors?

A. They disqualify themselves by taking advantage of that provision of the law.

Q. Where is that stated in the law, Mr. McGurrin, that they so disqualify themselves?

A. It is not stated in the law, but we can't accept a special juror who can serve only certain months of the year.

By the Court:

Q. You mean you don't accept them?

A. We don't accept them, because a special juror must be available at all times for service, any month.

By Mr. Fitzsimmons:

Q. Mr. McGurrin, I assume then that if a man only names two months or three months or four——

A. Two months.

[fol. 116] Q. If he names three months, is he disqualified?

A. Yes.

Q. If he names four months is he disqualified?

A. We don't usually limit it to three months. We prefer to have them about two or three months.

Q. You are asking them to express a preference?

A. Yes.

Q. That is not a mandatory statement?

A. No.

Q. That although they express a preference, a Judge will grant that preference, is it?

A. No; but it helps the operation of the jury system, and we are guided by his answer here.

Q. Have you examined the detailed forms filled out by the 300 prospective jurors in this panel?

A. Yes, at one time or another.

Q. Have you noticed that on many of those forms jurors have designated two months as preferable months during which they would desire to serve, and that thereafter there is a line drawn through that preference?

A. Yes.

Q. That is a fact, isn't it?

A. Would reach us through the inadvertence of the juror when making it out, by putting down two months; and when asked in a supplementary question if those were the only two months, and why he picked those two months, he probably came back by saying, "Well, I don't think it matters very much."

[fol. 117] Q. And then you would say, if he made such answers, the clerk would then send him in to see you is that right?

A. Yes, yes, but only——

Q. And all those other prospective jurors who were otherwise qualified, merely because they answered the question put on a questionnaire;—I presume by you?

A. Yes.

Q. (Continuing.) —asking them to designate preferential months——

A. Yes.

Q. (Continuing.) —are automatically disbarred, by your action?

A. Yes. As a matter of fact, I never see them.

Q. Mr. McGurrin, I asked you before whether at any time heretofore you had ventured an opinion as to how many members of the general jurymen had disqualified themselves by answering adversely Questions No. 20 to 24, or any of them on the questionnaire?

A. Yes.

Q. Now, I assume you remember, sir, that you testified in a similar proceeding in a case entitled "The People of the State of New York against Comprodally Publishing Company"——

A. What is the name of that case?

Q. The Hathaway case?

A. Yes, I remember that.

Q. Mr. McGurrin, I didn't mean to confuse you——
A. That was the Daily Worker case.
Q. Yes. We will call it the Daily Worker case, then.
A. Yes.
Q. That refreshes your recollection?
A. Yes.
Q. You testified in that case, did you not?
A. Yes.
Q. And you were asked questions in that case relative to the number of the jurors on the general list?
to the number of the jurors on the general list?
A. Yes.
Q. Who qualified favorably?
A. Yes.

[fol. 118] The Court: What was the date of that? What year?

Mr. Polakoff: Oh, the year 1941.

Q. I will read the questions and the answers you gave and ask if that will help your recollection.
A. All right. Yes.

Mr. Polakoff: I am reading from page 145. I hope it is the same record you have:

Q. "Q. Now, was it not a fact, Mr McGurrin, that whether under the old system or the new system, there are thousands of people who answered those questions which are required under 749 AA correctly or properly, as far as their qualifications for special jury service? A. Yes, that is true." Would that refresh your recollection, that you may have given that subject some thought?

A. The old and the new system—of course, the old system was perhaps fresher in my mind at that time, the operation of the old system than it is now. In fact,——

Q. Mr. McGurrin, the new system was in effect in 1941?
A. Yes.

Q. And undoubtedly the questions were referring to the jurors and the jury system as it was then constituted in 1941. Maybe the following questions and answers would help refresh your recollection——

Mr. Gelb: It was April 12, 1940.

Mr. Polakoff: I stand corrected.

Q. Was the new system in effect in 1940, sir?
A. Yes, it was in the——

Q. When did the new system go into effect so we have that in the date clear.

A. It was in the process of going into effect. It covered several years, you know.

Q. Well, when did it start, when did the new system start?

A. Oh, the end of 1938.

Q. And therefore, by 1940——

A. Yes.

Q. ——it was pretty well established?

A. Yes.

A. Yes.

Q. "Q. Would you say that it was only a small portion of those answering the questions correctly that are actually placed on the special jury list?

A. Relatively small since we have about 60,000 on our general list and only 3,250 on the special list. That is the relation of one list to the other." Does that refresh your recollection, sir?

A. Yes.

Q. That by far——

A. Yes.

Q. (Continuing) ——the great majority of the jurors on the general list have answered questions 20 to 24, inclusive, in such a manner that those answers would not disqualify them as prospective special jurors? Is that right?

A. Why, I remember them, but I still hold that we are governed or influenced by the answer of the juror on the questionnaire.

Q. Now, with all due respect to you, Mr. McG rrin——

A. Yes.

Q. ——you are now giving me the state of your mind.

A. Yes.

Q. What we are trying to show are the facts which caused you to form that state of mind.

A. Yes.

Q. That is why we are interested in the facts; just what you did, what the actual facts are, and that is why I am pressing my question.

A. I am not aware whether that Question, No. 23, was on the Questionnaire then or not. Perhaps it was. "What [fol. 120] months of the year between October 1st and June 30th would you prefer to serve?"

Q. Can you inquire as to when the present Questionnaire went into effect?

A. I don't say it wasn't on the Questionnaire.

Q. Mr. McGurrin, I am going to put a hypothetical question to you. If it appeared that by far the greater portion of the special jurors come from a small select section of the City of New York, would your answer be that that was purely coincidental?

A. Yes.

Q. And you mean that?

A. Yes.

Q. Out of the 60,000 names on the general panel which come from every part of our city——

A. Yes.

Q. (Continuing) —3200 names were picked purely by accident from a small special locality of our city.

Mr. Hogan: Now, your Honor, it presumes a state of facts and he is departing from the hypothetical question.

The Court: He is asking him.

Mr. Polakoff: We may prove that state of facts.

The Court: He has answered it, hasn't he? He said it was coincidental.

Q. That is your——

A. That is my answer.

Q. And residence did not enter at all?

A. No.

The Court: Well, he testified to that under Mr. Fitzsimmons' questions.

Mr. Polakoff: Your Honor, may we have a recess?

The Court: Surely. Take a short recess.

(A short recess was taken.)

[fol. 121] JAMES McGURRIN, resumes the stand:

The Court: Any questions, Mr. Hogan?

Mr. Hogan: I have one question.

By Mr. Hogan:

Q. Mr. McGurrin, is the Questionnaire, which I think has been marked Defendants' Exhibit D-1, prepared by the Appellate Division?

A. Yes.

Mr. Hogan: That is all.

By Mr. Polakoff (Continuing):

Q. Were there any instructions from the Appellate Division or any court, in writing, to the effect that if a juror designated two months as preferential months, that that disqualified him as a prospective special juror?

A. Not beyond what is embodied in the Rules—Rule 7, Subdivision 4, which states that as each ballot is drawn, consideration may, in the County Clerk's discretion, be given to the time of year when the juror would prefer to serve.

Q. Is that for special jurors or regular jurors?

A. All jurors, yes.

Q. And that means—when is the ballot drawn? What do you mean, when each ballot is drawn from the box? In other words, you have a wheel with all the jurors.

A. Yes.

Q. And if you draw Mr. Jones for this month and there is an indication on Mr. Jones' Questionnaire that he prefers November, you may give that consideration, is that right?

A. Well, we have what is known as the select wheel, which contains the names for example, of jurors, who pre- [fol. 122] fer the month of May; and they are drawn out of that wheel, you see. We have two; we have the general wheel, and the select wheel.

Q. Of course you are not obligated to follow that rule, are you? It is a "may", isn't that so?

A. No, but it wouldn't be practical to ignore that rule.

Q. Well, suppose you were short of jurors for January of all those; in other words, all the people who designated January their month did not furnish the required amount of jurors; would you dig in February or March or May, or would you close the card?

A. No. I don't recall any contingency of that kind. You are asking what we would do on that?

Q. Yes.

A. I would rather not answer, since we have never——

The Court: It hasn't got much to do with this inquiry anyway. That is all, I guess.

(Witness excused.)

THOMAS F. KANE, residing at 175 Riverside Drive, New York City, called as a witness on behalf of the defense (on the challenge to the special jury), having first been duly sworn, testified as follows:

Direct examination.

By Mr. Fitzsimmons:

Q. Mr. Kane, you are Deputy County Clerk assigned to the Division of Jurors in the County Clerk's office?

A. I am.

Q. And how long have you held that position?

A. Since February, approximately February 21, 1938.

[fol. 123] Q. And prior to that time you were an Assistant District Attorney in the County of New York?

A. Some years prior to that, yes.

Q. For a great number of years?

A. Yes. Acting District Attorney for three years.

Q. Now, you are familiar with the operation of the County Clerk's office, more particularly the Division of Jurors?

A. I am.

Q. And under what we call the—withdrawn. The present system under which your Division operates—that system has been in operation since late in 1938 or early in 1939; right?

A. The Questionnaire went into effect January 1, 1939, approximately. As fast as we could bring it into operation, we sarted the thing.

Q. And the same Questionnaire that is in effect today was in effect in 1939?

A. Well, substantially. There have been a few modifications, minor modifications; but substantially the same one that we adopted then is in force today.

Q. Who drew up the Questionnaire, your office or the Appellate Division?

A. Well, we all had a hand in it. Mr. Watson, Mr. Gamso, myself, Mr. McGurrin; we got up this Questionnaire. It has been approved by the Appellate Division, and it has been in operation since.

Q. Now, of course, before you put it in use, you had the Appellate Division approve of it, I assume?

A. Well——

The Court: He testified to that. He said it was approved by them.

The Witness: It was approved after we had gotten it up.

Q. Before you put it into use?

A. Yes.

Q. No doubt about that?

A. Well, my recollection is that it had received the ap-
[fol. 124] proval of the Appellate Division before we put it in operation, but I think Mr. Watson would be a better witness on that than myself.

Q. Now, down in your office you have several groups of jurors?

A. Four groups.

Q. Four groups?

A. Yes.

Q. One is a sheriff's jury——

A. General jury, special jury, grand jury, and a sheriff's jury.

Q. Now, confining ourselves to the special jury and the general jury—you have how many on the general jury at the present time?

A. Well, that varies from time to time.

Q. Approximately.

A. But it is approximately 60,000.

Q. And on the special jury you have about 3,000, right?

A. Well, that also varies. I imagine about 3,000. It goes up and down, but we are limited by the rules of the Appellate Division as to the maximum.

Q. And Questionnaires are filled out by those who are later put on the list as both general and special jurors, right?

A. We do not put anybody on our jury list until and unless they have filled out that questionnaire and have been examined by an examiner or by one of the Deputy County Clerks.

A. And have been accepted by our office.

Q. In other words, there are some persons who fill out questionnaires who are rejected?

A. Oh, a good many of them.

Q. So it is fair to say then that everybody you have in the 60,000 group has been accepted by your office, and the 3,000 group?

A. That is right.

Q. Now, you are in attendance daily at your office, are you not?

A. I am.

[fol. 125] Q. You know you have some three examining clerks who meet all the people who come in in response to letters sent to them by your office; right?

A. A notice is sent to a person whose name we have obtained, either from the registration list or from the census list or from the tax list or telephone directory or any other available source. We give them a number one, what we call a number one notice, requiring that person to appear in person at our office, and to be examined as to their—as to his qualifications for jury duty. We do not now send those notices to women because they are exempt and generally claim their exemptions if we did send notice. We have the right to require women to appear, but we have such a large, large percentage of them claiming their exemption, that we confined it then to those who volunteered—women who volunteered for jury service.

They fill out that Questionnaire after having been brought in on that notice, and then they are referred to one of the three examiners, who looks over the Questionnaire, and if they meet all the requirements of the Special Jury Law, and generally appear to be intelligent jurors, why, they then give consideration to the question as to whether or not they may become special jurors, and refer them to either Mr. McGurrin or myself. And we then examine them and decide whether or not to place them on the special jury list.

Q. Where did you get the names from that you send out these notices to?

A. All available sources—registration lists, tax lists, census lists, telephone directories—and any source that we can possibly find. Sometimes women have given us names of those who they think deserve or will make good jurors [fol. 126] and we send—we may send them notices, or they may come in, in response to a request from their organization. And we examine them.

Q. You also use club lists, like the Union Club, New York Athletic Club—clubs of that type?

A. Well, we don't find that such a large source of names. We get—we use all directories; all directories.

Q. Do those directories include all club directories of the City too?

A. Well, we do not exclude them.

Q. But you do use the names found thereon?

A. A little, not much, because we find so many of those are non residents; that only a few are residents of New York County, or a small percentage of them.

Q. Now, do you give any specific instructions to these three examining clerks with respect to whom to consider and whom to reject as special jurors?

A. We tell—our general instructions to the examiner is to be always on the lookout for those who may become special jurors, and if they on their Questionnaire have answered all those questions as required by law, they then refer that juror to either Mr. McGurrin or myself; and we then examine them further and decide whether or not to place them on the special jury list.

Q. Now, no one but the three examining clerks whose names were given by Mr. McGurrin are the ones who make that decision, right, in the first instance?

A. They are the three that are assigned to the work of examining jurors in the first instance.

Q. Now, do they keep any record of the number of people they bring in to either you or Mr. McGurrin for considera-
[fol. 127] tion as special jurors?

A. No, I don't think so. I don't know of any.

Q. Now, when you examine a man or woman as a prospective juror, do you have any set of questions that you put to the person?

A. No, I haven't any set of questions. I examine the jurors further if there is something in their answers that leaves me in doubt as to whether they would make good special jurors. Then I examine them on that point.

I also invariably ask them about capital punishment, circumstantial evidence, and whether or not they would be influenced by the failure of defendant to take the stand, or whether or not they would be prejudiced against any defense that the defendant might interpose, or prejudiced against any law. And then, after having answered those questions satisfactorily, I close it by asking them, if, after all of the evidence, they could decide this case fairly and squarely, taking the law from the Court, and the testimony and the evidence from the witnesses, and confine their decision solely on that, and render a fair and impartial verdict. And if they say they can, they are generally accepted as special jurors.

Q. And if they say they can't, what do you do then?

A. Well, if they can't render a fair and impartial verdict, they are not accepted on any jury.

Q. Even though the examining clerk accepted them and brought them in to you in the first instance?

A. Well, their Questionnaire generally indicates that they could act as fair and impartial jurors. But, if on questioning them, they or I am left in doubt as to whether they would act as fair and impartial jurors, they are out right there and then.

[fol. 128] Q. How many would you see in the course of any given month on an average?

A. That is impossible to say. It may be three or four a day, it may be three and four in a week. You never can tell. It depends on how they come in, and who comes in.

Q. Some weeks you might see five and some weeks twenty?

A. I have no way of knowing and I never keep track of how many I see. When the juror is referred to me, I examine him, and whether it is one a day or ten a day I don't know.

Q. You don't keep that record?

A. I don't keep a record of the ones I examined.

Q. You don't keep any record of the questions you ask them, or the answers they gave you?

A. Other than I have already indicated.

Q. I mean, you don't record those answers in any way?

A. No. They are not examined with a stenographer, no.

Q. You don't keep any record book of your own, say, that, "I accepted Jones," and "I rejected Smith"?

A. No. The Questionnaire then goes to the clerk who has charge of the special jury list, and he enters it in his docket and makes out a ballot, or whatever is necessary to do, to change the ballot from a regular juror to a special juror.

Q. Now, every one of these Questionnaires, that either accepts a juror as a general juror or special juror?

A. Every one?

Q. Every Questionnaire that results in a man being accepted as a general juror or as a special juror, there is record then made in a book, a large index book, right?

A. Of the special jurors, yes.

Q. And don't you keep a book of the general jurors too?

[fol. 129] A. Other than a card index. The Questionnaire

is one document, and the card index is the other; that is, as to the general jury list. As to the special jury list, there are two books in which are entered the names, occupation, age, and so forth, of those that are selected as special jurors, in addition to the Questionnaire and in addition to the index card.

Q. Now, the Questionnaire itself, that goes into a steel cabinet file, correct?

A. That is right.

Q. And it is listed alphabetically?

A. They are arranged in that file alphabetically.

Q. At a quick glance, one could look at a name and address, and an occupation, right, without examining the Questionnaire itself?

A. Yes. Generally, the name, the address, occupation, and date of birth is recorded on that part of the Questionnaire which is exposed just by pulling out the drawer, without opening up the Questionnaire.

Q. Do you keep any other record of the special jurors—withdrawn. How do you get their names into the wheel? I am referring now to the special jurors. When you get a group of special jurors or you get an order, rather, from the Court, to draw 300 jurors, special jurors, as you did in this case, how—what mechanics would you go through to draw the 300 names?

A. Well, we have a separate wheel for those, constituting the special jury, and that is under lock and seal. And then when we have a drawing, the seal is broken, the drawing made, and at the close of the drawing, those ballots that have accumulated in the meantime are then thrown into that special jury wheel. That wheel is not opened except when we have a regular drawing, or a drawing for a special [fol. 130] jury. And at the close of that drawing and before it is sealed up, those ballots that have accumulated by reason of the selection of special jurors—those ballots are then added or put into that special wheel.

Q. Before the drawing is made, or after?

A. After the drawing. I have already testified to that.

Q. Well, let us get it certain. Don't be disturbed, Mr. Kane.

A. No, I am not being disturbed, but that is what I already told you.

Q. I may not grasp it as quickly as you, who works with it every day.

A. It isn't my fault.

Q. No, but be patient and bear with us.

A. Oh, yes.

Q. Now, these names that accumulate as special jurors, over a period of time, when certain selections were made, how were they inserted into this wheel, daily, weekly, monthly, or when the wheel is opened for a drawing?

A. I have already testified that they are inserted when the wheel is opened, the seal broken in the presence of the presiding judge. And after the special drawing, the drawing of the special jurors, those accumulated ballots are then added to the wheel, put in the wheel.

Q. So that on the next drawing, you get the benefit of all the newly added names?

A. That is true.

Q. Have you any idea how many ballots or names were in the jury wheel when you were present at the time the jury in this case was drawn?

A. I think I drew this special jury, as I recall—I know there was a very great many in there. How many, I haven't any idea, except that there were a great many.

Q. You know how many special jurors were out of the wheel at the time, due to service in other courts?

[fol. 131] A. Well, that varies from time to time.

Q. Or for any reason.

A. That varies from time to time. Some are tied up in court. Some are not in that wheel by reason of the fact that they have served within the past two years at least five days, and therefore their names, their ballots are not put in the wheel until the expiration of that two-year period. I haven't any idea how many are tied up in court, but the number in that wheel fluctuates from time to time.

Q. Now, going back to your duty of interviewing these special jurors who are brought to you by the examining clerks. Have you any way of telling us how many you reject in the course of an average week or month?

A. No, I haven't any way of telling how many I reject. I know if they do not answer my questions satisfactorily or the questions on the Questionnaire, I do not place them on the special jury list.

Q. How much time do you spend with the average prospective juror?

A. That varies. It all depends on the answers I get to my questions. Just the same as you are examining me now.

Q. Some persons you spent a short time with, and others you spent a longer time?

A. One answer may lead to a dozen questions. You can't tell.

Q. What is the longest time you spent with the average person?

A. Why, I don't know. Probably half an hour or an hour sometimes, maybe ten minutes, maybe five minutes.

Q. What would you talk to a man about for an hour?

A. As to his views concerning general jury service, or as to the answers that he gave me as to whether or not he could serve as a competent juror. Some of them when ex- [fol. 132] amined further, in addition to the answers that they make on the Questionnaire, seem to sometimes indicate a doubt as to whether they could really be an impartial juror. Some of them, although they have answered that last question on the Questionnaire satisfactorily, when examined further, they may make me doubtful as to whether or not they would give every class of defendants proper, fair trial. So that leads—one question leads to another, one answer leads to a dozen questions oftentimes.

If they can't measure up, they are not accepted. Sometimes not accepted as any kind of a juror.

Q. But you keep no record of the questions that you ask them or the answers they give you, and you don't go by any form except what your good judgment dictates to you, is that right?

A. Well, I am guided——

Q. Is that right?

A. I am guided by the answers on the Questionnaire and the answers they will give to me from my questions. I never know what questions I am going to ask a special juror, because I don't know what answer he is going to give me to questions that have already been asked him.

Q. But when you start an interview, Mr. Kane, you let your good judgment guide you, right?

A. Why, certainly.

Q. Do you keep any record——.

A. (Continuing) I also do that so as to find out whether the juror really is intelligent, because we try very hard to get intelligent jurors.

Q. What is your standard on which you base intelligence?

A. By the answers they give to the questions, general knowledge on things. We are not guided by their education. We are guided by their intelligence.

[fol. 133] Q. What answers would they make that would help you to judge whether they were intelligent or not?

Mr. Hogan: I object to that.

A. The same answer a juror in court makes to you when you are examining him in selecting a jury.

Q. Do you keep any record down at your office about the way any of the special jurors vote in cases?

A. We are not concerned with that.

Q. No; do you, yes or no?

A. We do not.

Q. Do you ever receive an order from any source, Appellate Division, Supreme Court, General Sessions Judge or anyone else to remove the names of any persons as special jurors?

A. No. We wouldn't be——

Q. No. That is all. That is an answer.

A. All right.

Q. Now, in the time you have been Deputy County Clerk assigned to the Division of Jurors, you say in all that time, Mr. Kane, you never received such an order?

A. No.

Mr. Fitzsimmons: That is all.

The Court: That is all, I guess. Any questions?

Mr. Hogan: No questions.

Mr. Fitzsimmons: That is all.

[fol. 134] Warren H. Mayell, residing at 19 Hollywood Avenue, Tuckahoe, New York, called as a witness on behalf of the defense, (on the challenge to the special jury), having been first duly sworn, testified as follows:

Direct examination.

By Mr. Fitzsimmons:

Q. Are you an attorney and counselor-at-law duly admitted to practice in the courts of the State of New York?

A. I am.

Q. How long have you been such?

A. Ten years.

Q. Are you associated with me in the practice of the law?

A. I am.

Q. At my request, did you go to the County Clerk's office, more particularly the Division of Jurors, on the 31st of January 1945?

A. I did.

Q. Did you thereupon examine the list of special jurors, about 3,000 in number?

A. I examined approximately 3,000 names that were contained in the filing system that was shown to me by a clerk in the office.

Q. Did you proceed to make a survey, listing the number of jurors that you found in the files there, as to their occupations?

A. I did.

Q. And no doubt you found various occupations listed thereon?

A. I found many of them.

Q. What did you do with respect to classifying these various jurors to various types of occupations?

A. I tried to classify them to groups, making them not too numerous. And as I went down the list, I took each name and indicated on a slip of paper the number of persons who, for instance, were bankers, who had listed their occupations as bankers. I indicated on another column on my paper the names of persons who had listed their occupation as brokers, and so forth.

[fol. 135] Q. Now, thereafter did you compile the list that you made?

A. I did.

Q. Did you list under each particular class of occupation the number of persons registered thereon in that class?

A. I did.

Q. And did they total the number of names that you found in the special jury panel in the Division of Jurors' office in the County Clerk's office?

A. They did.

Q. And did you thereupon——

The Court: Why don't you offer it? Let us get it in, if you want to offer it. Any objections?

Mr. Hogan: I object to it, your Honor, yes.

The Court: I will receive it, and give you an exception.

(Received in evidence as Defendants' Exhibit D-2.)

Q. Showing you Defendants' Exhibit D-2 in evidence, how many laborers did you find in the files of the County Clerk's office?

Mr. Hogan: I object to it, your Honor.

Q. (Continuing:) On the special jurors list?

Mr. Hogan: The exhibit is in the record, and I don't think we need any testimony from the witness as to what he found.

The Court: That is right. I will look at it.

Mr. Hogan: I don't concede the authenticity of it.

[fol. 136] The Court: Sustained.

Q. How many women did you find on that list?

Mr. Hogan: Same objection.

The Court: Same ruling; sustained.

Mr. Fitzsimmons: All right. Your witness.

Cross-examination.

By Mr. Hogan:

Q. Mr. Witness, when you found on a card that a juror had listed his occupation as banking, did you thereupon place him under the classification "Banker"?

A. I did.

Q. So that a clerk who — working in a banking house, might, under your classification then be regarded as a banker, is that true?

A. Unless a person puts down "bank clerk," then we listed him as "clerk." I think you will find on that sheet a listing of "clerks."

Q. But where it said "banking," you listed it as a banker?

A. On that list, yes.

Q. And the same way, if he said brokerage business, you would list him as a broker?

A. If he puts "brokerage business," I atempted to look further on the card, and down at the bottom of some of the cards they had slips in them, on which it might indicate the

firm he was connected with, or some other indication of what his classification was with that busin - . And if I could enumerate it further and find out from that he was a banker, I put it in the "Bankers." If I could find out from it that he was a clerk, I put it under "Clerks."

Q. Well, you found some men who said that they were in the brokerage business, and you checked the name, and [fol. 137] you probably found the person's name did not appear in the firm name, but you would still list him as a broker, is that right?

A. Well, Mr. Hogan, nobody as I recall it in answering a question which merely called for their occupation, wrote out "I am in the brokerage business." They put down as a rule "broker." And if they did that, I put them under the classification of "broker."

Now, if they put "clerk" or "brokerage clerk," then I put it under the classification of "Clerk." But you will find on those lists that men don't put their occupation that "I am in such and such an occupation." They list it as a name. And I tried to classify them to the best of my ability under the name that they listed them as.

Q. Although it probably would not reflect what a man's daily occupation is, although it would indicate what he considers his trade or profession?

A. Well, I think the card calls for his occupation. If a man doesn't put down what his occupation is, there is no way I can tell what it is, from that list.

Q. There is nothing on the card which would indicate what actually engages a person's time during the day?

A. Other than what he puts as his occupation.

Q. It simply indicates the field in which he is employed?

A. Well, I think it went further than that. A man who listed himself as an engineer, a mechanical engineer, a chemical engineer, I listed them under those types. A man would list himself as a manufacturer, and I put him down as a manufacturer. I did not try to guess these things. I took them from those records.

Q. Where did you get the clasification "laborers," then? [fol. 138] A. One person, as I recall it, put down on this card, and it was one of the first that I looked at, "Labor representative," or "Labor organizer." I don't exactly remember the words. So I put a classification under "Labor," and that was the only man that in any way indicated on that card that he had any connection with labor.

Q. Then you have two classifications here, "Labor Union representative," and "Laborer."

A. Well, I put down, distinguishing a labor representative from a person who would say that he was a member of a labor union; and there were none other than this one I talk about, and he merely put himself as a labor representative or a labor organizer. I forget which word he used.

Q. Well, isn't a mechanic a laborer?

A. A mechanic? No. I didn't class him as a laborer, because of—let me look at my sheet here——

Q. You have mechanics there, haven't you?

A. Yes.

Q. But you didn't regard them as laborers?

A. No, because——

Q. Well, that is all——

A. (Continuing:) —as I recall it——

The Court: Never mind the reasons. Just answer.

A. (Continuing:) I did not classify it as a laborer, because of what it said on the card.

Mr. Hogan: That is all.

The Court: That is all.

Mr. Fitzsimmons: That is all, thank you. That, your Honor, completes my proof on the challenge.

[fol. 139] The Court: That is your case. Any proof, Mr. Hogan?

Mr. Hogan: No, your Honor.

DEFENDANTS' CHALLENGE OF JURY PANEL DENIED

The Court: Challenge denied.

MOTION TO DISCHARGE PANEL

Mr. Fitzsimmons: Exception. I now make a motion to discharge the panel as it has been ordered drawn by your Honor to sit as trial jurors in this case for two reasons:

That on Monday, February 26th, the day the jury panel was ordered to come to this Court, there was published in the New York Daily News in all editions, more particularly I have the edition marked "Three Star Final," page 4, an article concerning and entitled "Extortion Trial of Fay-Bove, Indicted Two Years Starts Today."

The Court: I read it. You don't have to read it.

Mr. Fitzsimmons: I want to read certain parts in the record.

The Court: Go ahead.

Mr. Fitzsimmons: Under the by-line of John Crosson; and I now offer that entire article in evidence.

The Court: All right. Received and marked D-3.

Mr. Fitzsimmons: May I tear off this one page for the purpose?

The Court: Just have the page marked that has got the article.

Mr. Fitzsimmons: I offer in evidence page 4 of the New York Daily News, Three Star Final, of February 26, 1945, as Defendants' Exhibit D-3.

[fol. 140] (Received in evidence as Defendants' Exhibit D-3.)

Mr. Fitzsimmons: I now offer in evidence, page 3 of the New York Journal-American of Monday, February 26, 1945, calling particular attention to an article written by one Westbrook Pegler, entitled "As Pegler Sees It"—"Camp Shanks Another Example of Profits by Devious Means."

(Received in evidence as Defendants' Exhibit D-4.)

Mr. Fitzsimmons: Your Honor has just told me you read the article in the New York Daily News, so I won't spend too much time arguing that article with you, except again to call to your attention that particularly dangerous paragraph inserted therein, in which they write,—in which John Crosson writes, "Fay, a political power in his native north is quoted as saying 'they won't testify at the trial, I'll take care of that' "—meaning the complainants who are contractors in this case and who may be subpoenaed as witnesses.

Now, a more serious article by far appeared in all of yesterday afternoon's and evening papers, in all editions of the New York Journal-American, with this syndicated article as written by one Westbrook Pegler. While its title has nothing whatever to do with either one of the defendants in this case, or with anything that this case has to do with, nevertheless, as the article unfolds itself, it talks [fol. 141] about the influence that both unions, both the Operating Engineers Union and the Laborers Union had over the workers of those unions, who in turn were em-

ployed in building the Delaware Aqueduct Water Supply System over a period of time, which is the subject matter in this present indictment.

Now, among other things that he says here is that—I am quoting from the fifth paragraph of this article:

"These were the Hod Carriers Union which had gone more than 30 years without a convention or a legal election of officers, and the Operating Engineers Union dominated by William E. Maloney of Chicago, and Joe Fay, a drunken thug and politician of the Frank Hague Chapter of the 'Party of Humanity'."

Now, that is anything but fair newspaper reporting of a defendant who goes on trial, on the very day that this article is published in the same city as the article appears in a widely read and circulated newspaper. And an even more disturbing feature of this article is the one which goes on in great detail, commencing with the sixth paragraph of the article, continuing almost down to the end of it, in which they go on to state that $300,000,000 was allowed of Federal money with which to build this tunnel, and they talk about all the corruption that happened during the building of it, and by innuendo and so-called clever writing, they try to hang that, at least part of it, on this defendant, Joe Fay, [fol. 142] who is now on trial before your Honor.

They also talk about many investigations that were conducted up there in and around the building of this tunnel, and investigation of some part of the unions in which both these men had something or other to do with, over the period of time that they speak about and which is the subject matter of the indictment on this trial.

I say this is highly dangerous. It is highly inflammatory if, on the first day of the trial, we are greeted with a facetious article, at least an article vicious to the core, but written in a facetious vein, probably to get the approbation and approval of those in authority, and then on the afternoon of that same day all those jurors who are called to come into this court and who are supposed to give a fair and impartial trial have thrown up in their faces the evidences of the character, of the background of opinionated evidence of someone else who is not a part of this case, who is not going to come here and be cross-examined, who is not going to face this defendant, but who, by powerful writing or

powerful reporting is able to reach in his tentacles into this court room and control the very jurors who are to sit in the trial of this case even before they come into the box.

Now, if that appears on the first day, I say to your Honor what is going to appear on the second and the third and the [fol. 143] intervening days, as you go along? In England, as I read English jurisprudence, reporting of this kind is contempt of court. In our country, under the development of the freedom of the press right, a great many articles are tolerated. But many courts have become infuriated with less serious and less vicious articles than these two which appear right at the start. Your Honor can believe me, when I say with all the integrity at my command, that yesterday morning as I stood out in this hallway out here, when it was crowded with jurors or prospective jurors waiting to do their duty here, at least two of them held up copies of the Daily News and turned to page 4, and gathered other jurors around among them and discussed the contents of that article between themselves—some laughingly, and some otherwise. And these were the jurors, if your Honor please, who did not come to the bench and offer any excuses or any reason why they should be excused for one reason or another, but men who are waiting their turn to qualify, and I presume because they felt they were a fair and impartial type of jurors.

Now, if that is the kind of business we are going to have here, I say that something must be done about it to assure the defendant a fair and impartial trial. That isn't starting off fairly and squarely. That is starting off with 29 strikes on a person.

Now, I make that the basis of the motion to discharge this entire panel, because they are all residents of the [fol. 144] County of New York, they are all readers of these papers, or they come in contact with people, either during their time here, their time at home, their time in their clubs or their time at their businesses when, because of what they do and what they talk about they must of necessity hear about these articles and have them discussed for them, if not by themselves.

Now, it is plain common sense if one argues the mechanics of the proposition, that if I were a juror and I received a notice to report in this court room tomorrow morning, and it was a notice as a special juror, that the names of the

defendants who were on trial would appear on that notice; I would no doubt talk about it at least to my wife and then to my friends at the club, and I would announce generally to everybody that I was being called down to appear at the Fay-Bove trial. And immediately anybody who has read any of these articles would immediately start a conversation in my presence, and again I am brought into an influence that shouldn't prevail with respect to jurors who are coming here to be called to task on the greatest right that any individual possesses.

I strongly urge that your Honor discharge this panel, and I say that with all the sincerity at my command, not as a dilatory move, not as a tactic which might be construed as something to give me an adjournment, but rather because I feel very seriously the great deterring effect this has on the right of these two men to get a fair and impartial trial here.

[fol. 145] MOTION FOR CHANGE OF VENUE

I likewise make a second motion, which want recorded on the record, and that motion I will file in writing tomorrow morning when I get a chance to do it, if your Honor so desires, but I make it verbally now—for a change of venue from this County to some County where we don't have to put up with articles like these.

Now, it may be contended, just as Mr. Hogan may very well attempt to answer me, that the County of New York has gone to great expense to bring 300 jurors here yesterday, to bring more here today, and the remainder who were not excused, here tomorrow, and that it has taken a long while to try this case—all of which is no fault of Mr. Hogan's or mine. But whether it takes a short time or a long time to try the case, whether or not it is expensive to the County where the trial is to be held or not, and whether a justice like your Honor is taken from another section of the State or not, is not the important thing to worry about; but the first and foremost thing to concern the Court should be whether or not the defendants in the case will receive a fair and impartial trial, according to the laws as they are written on our statute books. And I say that that argument applies to both my motions for a discharge of the panel as they are presently constituted, and as they remain, and before they come here tomorrow

morning or at the time they appear tomorrow morning, and for a change of venue out of the County of New York to a County where the press will have more respect for [fol. 146] the dignity of the Court, and the dignity of the prosecutor's office.

I am not laying this blame on Mr. Hogan. He doesn't control these papers. I don't charge him with that, but I am the recipient of the result of it—I as the attorney, my client more so than I.

I respectfully urge those motions upon your Honor.

DENIAL OF MOTIONS TO DISCHARGE PANEL AND FOR CHANGE OF VENUE

The Court: Both motions are denied.
Mr. Fitzsimmons: Exception.
The Court: Anything further?
Mr. Fitzsimmons: That is all from me.
The Court: Recess until tomorrow morning at ten o'clock.

Bail continued for both defendants.

(Adjourned until Wednesday, February 28, 1945, at 10:00 o'clock A. M.)

Room 1530,
Criminal Courts Building,
New York City, N. Y.,
February 28, 1945.

(TRIAL CONTINUED PURSUANT TO ADJOURNMENT)

(There was a conference at the bench between Court and counsel, off the record.)

DENIAL OF APPLICATION FOR POSTPONEMENT OF THE TRIAL

The Court: No further motion is made, so the application for a postponement of the trial is denied.

[fol. 147] During the course of the trial, it is stipulated that an objection by either counsel for a defendant shall apply to both defendants, unless specifically stated by counsel at the time.

Mr. Hogan: And exceptions will inure to the benefit of both?

The Court: Exceptions will inure to the benefit of both.

Mr. Fitzsimmons: Defendants will have an exception to every adverse ruling without the specific taking of the same.

The Court: We will take just a five minutes recess at this time.

(A short recess was taken.)

The Clerk of the Court: Jurors will kindly answer and step forward as their names are called:

Harvey W. Frank.

Edward L. Champion.

William H. Conboy.

(The respective Talesmen were then sworn collectively by the Court, and thereafter examined:)

Harvey W. Frank, residing at 590 Fort Washington Avenue, New York City, a Talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

Statement by District Attorney

Mr. Hogan: Your Honor, and Mr. Frank, with his Honor's permission, I am going to read certain names to the Panel in order that I won't have to duplicate that effort each time.

[fol. 148] (Addressing all the prospective jurors in the Court room:) Ladies and gentlemen of the Panel: His Honor has consented at this time that I speak very briefly in description of the indictment, and mention the names of the participants in the trial. That is done in order to conserve time, and in order that I won't have to ask each prospective juror whether he or she knows the defendants named; that is, I won't have to repeat their names, and I won't have to repeat the names of counsel.

The defendants in this trial are Joseph Fay, an International officer of the Union of Operating Engineers, and also the business agent of certain locals of that International; and James Bove, an International officer of the Union of Hod Carriers and Common Laborers and also the secretary-treasurer of Local 60, an affiliate of that International.

The indictment contains seven counts. The first count charges these two defendants with the crime of conspiring

to commit the crime of extortion. Then there are six additional counts, each of which charges the two defendants of the crime of extortion.

The defendants are represented by the following counsel: Robert J. Fitzsimmons, Moses Polakoff, Thomas R. Fay, John W. McGeehan, Jr., Warren H. Mayell, and John Mooney. My name is Frank Hogan, and associated with me in this prosecution are Assistant District Attorneys Sol Gelb, Joseph Sarafite, and Vincent O'Connor.

Now, the names of certain construction companies may [fol. 149] figure in the testimony and I want to read those companies, the names of which appear in the Indictment: The Seaboard Construction Corporation, the Utah Construction Company, Associated Contractors, Inc., Walsh Construction Corporation, B. Perini & Sons, Inc., New York Trap Rock Corporation, J. F. Shea Co., Inc., and Henry J. Kaiser Co.; Mason & Hanger Co. Inc., and George M. Brewster & Son, Inc. Will you bear those names in mind, and make a mental note if you know any one of the persons, or if you are acquainted with anybody who is connected with any of the firms mentioned.

Mr. Fitzsimmons: Mr. Frank and other jurors, Ladies and Gentlemen of this Special Panel: My name is Robert Fitzsimmons. I am one of the counsel for Joseph Fay. Likewise, as Mr. Hogan's idea is to save time, I want to read certain names to you, and if it happens that any of these names remind you of persons that you know of, I want you to tell me of your knowledge of those persons if you are called and take a seat in the jury chair.

One of the companies mentioned in this indictment is the Associated Contractors. Mr. Hogan mentioned that company. I want to call to your attention one of the officers and executives of that company: Thomas J. Walsh, President, Henry J. Kaiser, vice-president, David Small, vice-president, Charles A. Shea, vice-president and secretary, and J. Henry Gill, vice-president and job manager; John S. MacDonald, vice-president, chief engineer; Edward P. [fol. 150] Walsh, treasurer. J. F. Shea Company, Incorporated, Henry J. Kaiser—that is the same Henry J. Kaiser who was mentioned as an officer of the Associated Contractors; and Charles A. Shea, president. Mr. Shea has since passed away, so I don't think we need concern ourselves about him. Edward H. Shea, secretary; Henry J. Kaiser, president of the Henry J. Kaiser Company;

Thomas M. Price, general manager; Charles A. Shea, general superintendent.

Then we have the Walsh Construction Company: Thomas J. Walsh, president; he is the same Thomas J. Walsh who is mentioned as the president of the Associated Contractors. Thomas J. Walsh, president; David Small, vice-president; J. Henry Gill, vice-president; William A. Durkin, vice-president and job manager; Edward P. Walsh, treasurer; John S. MacDonald, chief engineer.

Then there is the Utah Construction Company: Augustus H. Ayres, Job manager; Benjamin Arp, general superintendent.

Then we have the Seaboard Construction of which Harry F. McLean is president; Louis R. Perini, spelled "P-e-r-i-n-i", secretary; Arthur A. McLaren, chief engineer; James O'Rourke, superintendent.

Another company appears as B. Perini & Sons, Incorporated, of which Louis R. Perini is president, and he is the same person who is the secretary of the Seaboard Construction Corporation.

Then we have the Mason & Hanger Company, Incor- [fol. 151] porated, Miles I. Killmer, vice-president; Francis Donaldson, vice-president; Howard King, chief engineer; and Guy Sackett, manager.

All these companies had contracts for building part of the Delaware Aqueduct Tunnel. The construction of that tunnel was commenced sometime later in 1937 or early 1938, and each one of these companies was awarded a contract in the building of that tunnel, water tunnel, which is as yet not completed. The last part of the construction on it was stopped due to the coming on of the war in 1941. That tunnel runs from New York City up into the Catskill Mountains.

Now, if you know any of these persons, if you are called to the jury chair, please call them to my attention. Also if you are acquainted with Mr. Hogan or any person in Mr. Hogan's office, whether he be Mr. Sarafite or Mr. O'Connor or Mr. Gelb; or if you are acquainted with any law enforcement officer, or if you are a law enforcement officer of any sort of the City of New York, please call those facts to my attention, if you are called.

Thank you.

(The examination of the talesmen then proceeded as follows:)

By Mr. Hogan:

Q. Mr. Frank, do you know any of the persons whose names have been called?

A. I don't believe I do. There was a Mr. McLean mentioned, wasn't there.

[fol. 152] Q. Yes.

A. He has no connection with the firm of Poirier & McLean, has he?

Mr. Fitzsimmons: The answer is "no".

Q. Will you tell us more about the McLean you do know?

A. I don't know Mr. McLean. I do know Mr. Poirier.

Q. I see. You weren't acquainted with anybody in the various firms, the names of which Mr. Fitzsimmons and I have mentioned?

A. No, sir.

Q. What is your occupation?

A. I am employed as an engineer with the New York Telephone Company.

Q. How long have you been with the Telephone Company?

A. About over 17 years.

Q. Does that represent your working career or——

A. It has since I left school.

Q. Yes. What school did you attend?

A. N. Y. U.

Q. What type of engineering is it, Mr. Frank?

A. It is telephone trunk cable work, underground trunk cable, primarily.

Q. What branch of engineering did you specialize in?

A. At school I took civil engineering.

The Court: Excuse me, Mr. Hogan. There are some jurors here standing. Will they please step forward? They can take these seats in the jury box. Any juror standing can come forward and get a seat here.

By Mr. Hogan (continuing):

Q. Now, have you formed any opinion or impression with respect to the innocence or guilt of these defendants?

A. No, sir.

[fol. 153] Q. As you sit there, you haven't any reservation in your mind with respect to your ability to be fair and impartial in this case?

A. No, sir.

Q. If you were selected as a juror, you will listen to the evidence and give your verdict after all the evidence is in and the summations have been made and the Judge's charge, strictly on the testimony in the case?

A. That is correct, sir.

Q. And you will not be influenced by prejudice or sympathy of any kind or character?

A. No.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Frank, what type of work did you say you did with the New York Telephone Company?

A. Primarily toll and trunk underground cable. But I have also had experience in other departments, because of rotation on the job.

Q. In any of that work, do you come in contact with any law enforcement authorities?

A. No.

Q. What newspapers do you read, Mr. Frank?

A. Normally the New York Times.

Q. Morning?

A. Morning.

Q. What paper in the afternoon?

A. New York Sun.

Q. Sun?

A. Occasionally.

Q. Did you ever read a columnist named Westbrook Pegler?

A. No.

Q. You don't read his articles at all.

A. I don't take his paper.

Q. Did you ever discuss his writings with any of your friends?

A. No.

Q. Did you ever read anything in the newspaper about [fol. 154] this case before you were called as a juror?

A. No.

Q. The indictment was returned in this case in 1943—May 19, 1943. You didn't read anything about it at that time?

A. I may have read something. I don't recollect anything in particular at that time. It made no impression.

Q. Now, have you been reading about the case since you received your notice to come here as a juror?

A. I could hardly avoid it, but that is all that has appeared.

Q. And the papers you read in connection with this case were the Times in the morning and the Sun in the afternoon?

A. That is right.

Q. As the result of reading any articles concerning this case, have you formed any opinion as to the guilt or innocence of these defendants?

A. No, sir.

Q. Or either of them?

A. No, sir.

Q. Have you discussed your service with anyone, say, first at home, or going to the club or the office?

A. Only in so far as notifying the office.

Q. Did you discuss the merits of the case, or whom the defendants were, with any people that you discuss it with or talk about it with?

A. I have not discussed the merits at all.

Q. Did you ever express an opinion as to the guilt or innocence of the defendant Fay?

A. No, sir.

Q. Do you know anything at all about the facts in the case?

A. No.

Q. Did your company do any work in connection with the building which still remains uncompleted on this Delaware Aqueduct Water Tunnel?

A. Well, the Telephone Company would have nothing to do with that.

[fol. 155] Q. Your company then had nothing to do with it so far as you know?

A. So far as I know, no.

Q. Does your company, or did your company have any connections with any of those companies that I mentioned, in so far as your personal work is concerned?

A. Well, I don't think that would be within our jurisdiction, because my own department is the Manhattan and the Bronx, and I think this case——

Q. A great many of these companies have offices in New York County.

A. You know what I was thinking of, is, we would only be concerned in so far as there was re-location of cable and plant.

Q. But as you personally are concerned, you had no connection with any of these companies I mentioned?

A. No, sir.

Q. Now, you are what; about 40 years of age?

A. 38.

Q. And have you served as a special juror prior to your being called today?

A. Yes.

Q. How long ago did you serve?

A. About two or three years ago. About three years.

Q. In the Supreme Court or in General Sessions?

A. I believe it was General Sessions.

Q. What type of case did you serve on there?

A. It was a first degree murder case.

Q. Have you had any other prior jury service in addition to that one occasion?

A. Another case before that, several years prior to that.

Q. Another murder case?

A. That is correct.

Q. That is the only jury experience you have had?

A. The only experience I have had on this panel.

Q. As a special juror?

A. That is right.

Q. Prior to that you had some service as a general juror in other courts?

A. That is right.

[fol. 156] Q. Have you ever been a member of a labor union?

A. No.

Q. Were you ever asked to join one?

A. Well, I don't know whether you would call this a labor union or not. I did join for a short time an employees union of the Telephone Company which was for the period that I was in central office work.

Q. For the period what?

A. That I was in central office work. I doubt if it would come under the scope of your definition.

Q. What was the name of the union you joined then?

A. I think at that time it was probably called Telephone Employees Union.

Q. Would that be—am I terming it correctly when I say that was what we call a company union?

A. Well, I don't know whether it was at that time or not.

Q. Well, the membership of the union was made up of employees of the New York Telephone Company who did some particuluar work for the company?

A. That is correct.

Q. And all your meetings were held on New York Telephone Company property?

A. At that time, it was.

Q And how long did you remain as a member of that union?

A About a year.

Q. Did you pay dues into the union, or did the company pay them for you?

A. No, it was deducted.

Q. The company deducted dues from your salary?

A That's right.

Q. Are you a member of that union any longer?

A. No.

Q. Now, were you ever asked to join any other union?

A. No.

Q. What is your opinion——

[fol. 157] A. (Continuing:) I was never asked to join the union, is what I mean.

Q. What is your opinion of labor unions, do you think they are good or bad?

Mr. Hogan: I object to that, your Honor.

The Court: What has that got to do with his qualifications?

Mr. Fitzsimmons: If he feels any prejudice against labor unions.

The Court: The labor union isn't on trial here.

Mr. Fitzsimmons: I beg your pardon?

The Court: There is no union on trial here.

Mr. Fitzsimmons: What is on trial here are two officers of unions.

The Court: Yes.

Mr. Fitzsimmons: And any difficulty that they now may find themselves in as an officer of that union. I propose therefore to ask the question——

Mr. Hogan: Your Honor, it is entirely incidental they are officers of labor unions. They are on trial as anybody else would be, charged with a crime. It makes no difference what their position is.

Mr. Fitzsimmons: I respectfully feel I should be allowed to inquire into his opinion of labor unions.

The Court: What is the question, please?

(The question was repeated by the stenographer, as recorded.)

The Court: I sustain it as to that form.

Mr. Fitzsimmons: All right.

[fol. 158] Q. Do you object to unions, labor unions?

Mr. Hogan: I object to that, your Honor.

The Court: Yes. Has he any prejudice against any labor union or an official of a labor union.

Q. Do you have a prejudice against labor unions?

A. I have no prejudice against a labor union, nor an officer of a labor union.

Q. You have none?

A. No.

Q. Did you ever express any opinion about labor unions, or officers, to anyone?

Mr. Hogan: I object to the form of the question, your Honor.

The Court: Overruled.

A. I think I have opinions, the same as everybody else has opinions; but I don't know you would call them "prejudiced".

Q. Well, have you expressed opinions concerning labor unions and labor union officers?

A. To whom?

Q. To anyone?

A. Yes.

Mr. Hogan: I object, your Honor. I say it is obviously so broad a question, the witness can't possibly answer it.

The Court: Well, I will take an answer to this one.

Mr. Fitzsimmons: He says "yes".

Q. What were those opinions concerning labor unions or labor officials.

Mr. Hogan: I object.

[fol. 159] The Court: Sustained.

Mr. Fitzsimmons: Exception.

Q. Were those opinions good or bad concerning labor unions and their officers?

Mr. Hogan: I object, your Honor.

The Court: Sustained.

Q. As the result of having expressed opinions concerning labor unions or their officers, would you say that you have a prejudice against them?

Mr. Hogan: I object as already answered.

The Court: He has already answered it. He says he has none.

Mr. Fitzsimmons: May I ask him again, Judge, and have him answer again?

The Court: The objection is sustained on the ground he has already answered it.

Mr. Fitzsimmons: Exception.

Q. Have you close relatives who are engaged in the contracting business?

A. No.

Q. Have you been a contractor?

A. I have been employed during my college course, during the cooperative course, which occupied about a period of a year.

Q. What capacity?

A. Assistant engineer and timekeeper, et cetera.

Q. What company did you work for?

A. Two companies; The Underpinning and Foundation Company, and The Rhinelander Construction Company.

Q. Rhinelander Construction Company and the Underpinning——

A. Underpinning & Foundation Company.

[fol. 160] Q. And Foundation Company. Both having offices in New York City, I presume?

A. Yes.

Q. Your job there was a timekeeper?

A. In one it was timekeeper, and the other surveyor; surveyor and timekeeper combined.

Q. What college are you a graduate of?

A. N. Y. U.; New York University.

Q. Now, have you ever been a complainant in any criminal case? In other words, have you ever made a charge against anybody for any wrongful act they did against you?

A. No, sir.

Q. Did you ever act as a witness in any criminal case whatever?

A. No, sir.

Q. Have you ever been a witness before a Grand Jury?

A. No, sir.

Q. Have you ever served as a Grand Juror in this County or any other County?

A. No, sir.

Q. Have you ever employed persons who are members of labor unions?

A. No, I have not.

Q. Have you ever expressed any opinion concerning collective bargaining?

Mr. Hogan: I object to that, your Honor.

The Court: Sustained.

Mr. Fitzsimmons: Exception. May I ask your Honor if you sustained the objection as to the form of the question, or do you consider it improper?

The Court: I consider it an improper request as to his qualifications.

Mr. Fitzsimmons: Exception.

Q. Have you ever expressed any opinion about strikes?

[fol. 161] Mr. Hogan: Same objection, your Honor.

The Court: Sustained.

Mr. Fitzsimmons: Exception.

Q. Did you ever hear of any of these defendants, or have any knowledge of them except what you told me you read about it in the papers the last few days?

A. No.

Q. Before you were called in this case?

A. No, I have not.

Q. Did you ever discuss either of these two defendants, particularly Mr. Fay?

A. No.

Q. Is there anything about the indictment in this case, which charges Mr. Fay with the crime of conspiracy to commit extortion and the crime of extortion, that in any way forms a prejudice against him in your mind?

A. No.

Q. Would you have a prejudice against Mr. Fay because of the position he occupies in organized labor?

A. No.

Mr. Fitzsimmons: At this time, your Honor, another thought suggests itself, which I would like to get over to all the jurors at this time. It will save my asking each one.

The Court: All right.

Mr. Fitzsimmons: Mr. Hogan stated, Ladies and Gentlemen of the Panel, that Mr. Fay was or is one of the vice-presidents of the International Union of Operating Engineers which had its headquarters i Washington, D. C. That is correct. He is also business manager and business agent of a local union known as 825, having its principal [fol. 162] place of business in Newark, New Jersey. He has no other labor affiliations.

Q. Having heard my statement, because of any position, or because of the position he holds in organized labor, do you have any prejudice against him?

A. No.

Mr. Fitzsimmons: As both defendants must join in a challenge, I know your Honor agrees with me that is the law, I will reserve stating whether or not I have a challenge for cause until after Mr. Polakoff examines.

By Mr. Polakoff:

Q. Mr. Frank, I am Mr. Polakoff, and I am the lawyer for the other defendant, Jimmy Bove. You are familiar I assume, having served as a juror before, with our method of enforcing criminal law, and that is that an indictment in the first instance is found by the Grand Jury, and thereafter the men are tried before a Petit Jury,—or the defendants are tried before a Petit Jury. Would the fact that an indictment has been found against any individual cause

you to have any belief, however slight, that he might be guilty of the crime charged?

A. No.

Q. Would it make any difference to you whether the crime charged was a minor one or a serious one?

A. In what respect?

Q. As to whether there would be a subconscious feeling——

A. No.

Q. —that he might be guilty.

Q. Would it make any difference to you whether the amount, as in this case, is a considerable sum, that it is alleged that the defendants illegally secured?

A. No.

[fol. 163] Q. I mean, would you feel that because the indictment charges that they perhaps have gotten over $500,000, that there must be some foundation for the charge, and that they are possibly and probably guilty of the crime?

A. No, sir.

Q. Having served as a juror, I assume you are familiar with our very important rule of law that every defendant is presumed to be innocent of the crime charged, and should the Court, as I believe he will, charge you to that effect, would you follow that charge closely and carefully?

A. Yes, sir.

Q. In other words, if picked as a juror, you start with a complete open mind and a complete belief that the defendant is innocent of the crime charged?

A. Yes.

Q. Now, that is so, is it? There is no reservation about that.

A. No.

Q. And starting with that belief, and if the Court so instructs you, that that protection covers the defendants throughout the trial, would you stick to that belief until the People have proven beyond a reasonable doubt that the defendant is guilty?

A. Yes, sir.

Q. And if there is a reasonable doubt in your mind, and if the Court should so instruct you, you would give that reasonable doubt to the defendant?

A. Yes, sir.

Q. Do you know of any reason why the People, as well as the defendants, could not be given a fair trial by you?

A. No.

Q. Have you had any experience with labor unions, directly or indirectly, that has caused you personal loss or personal inconvenience?

A. No.

Q. Does the firm you work for—did the firm you worked [fol. 164] for ever have any trouble within your knowledge?

A. They have had jurisdictional disputes.

Q. Supposing it appeared that some trouble was caused to the contractors who worked on the Aqueduct job because of jurisdictional disputes. Would you hold the defendants or their unions responsible for such disputes?

Mr. Hogan: Your Honor, I submit that that question is altogether too broad.

The Court: Yes.

Mr. Hogan: I object to it.

The Court: Would you have a prejudice against either of these defendants?

Mr. Polakoff: All right, I will accept your Honor's modification.

Q. Do you understand my question, Mr. Frank?

A. Will you repeat it?

Q. Maybe I will cut it up for you. I believe there will be some proof in this case of serious jurisdictional disputes between various unions, and, as is usually the case, such disputes result in a hardship to the employer. Would the fact that such disputes occurred on the jobs which are the subject matter of this indictment, cause you to have any prejudice against the defendants?

A. I don't believe so. I think that would be determined by the evidence presented.

Q. Well, supposing you felt the defendants were or were not—let us assume you felt they were responsible for jurisdictional disputes, and supposing those jurisdictional disputes had nothing to do with the alleged crime as charged in the indictment. Would the fact that they may have been responsible—I don't say they were, but that is possible—would the fact that they may have been respon- [fol. 165] sible for jurisdictional disputes cause you to have any prejudice against them?

A. No.

Q. You understand my question, sir?

A. Yes.

Q. You understand the subject matter?

A. That is correct.

Q. In other words, all I am trying to ascertain is whether your mind is freely open, so that both sides can get a fair and impartial trial?

A. Yes.

Q. Would the fact that the indictment contains a number of charges—seven—cause you to have any feeling that because of the number of charges, there is a possibility or a probability that the defendants would be guilty?

A. No.

Q. In other words, you will keep your mind open, whether one charge is attempted to be proven by the People, or all—and judge the facts of each case as you hear them from the witnesses, give due weight to the credibility of the witnesses and then form a fair and impartial opinion, giving the defendant any benefit of a reasonable doubt?

A. Yes, sir.

Q. You so understand the law to be from your experience?

A. Yes, sir.

Q. Are you prepared to follow such instructions from the Court?

A. Yes, sir.

The Court: Any challenge for cause?

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: Peremptorily challenged by the defendant.

(The talesman was excused.)

[fol. 166] Edward L. Champion, residing at 404 East 55th Street, New York City, a talesman, having been previously duly sworn, was examined on his voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Champion, what is your occupation?

A. I am a mechanical engineer, and in charge of securing new business for the firm of Gibbs & Hill, incorporated. Will you please pardon me, sir, I have a cold.

Q. How long have you been with Gibbs & Hill?

A. Four and a half years.

Q. And prior to that?

A. Ingersoll Rand Company, 15 years.

Q. A mechanical engineer, you say?

A. Yes, sir.

Q. Was your work with the Rand Company similar to that with your present employer?

A. No, sir. The Ingersoll Rand Company, I was an engineer on principally two products—heat exchange equipment and pumps, and was an engineering salesman for those products.. In the present capacity for a firm of engineers and contractors I am engaged in securing new business principally of an engineering nature.

Q. In any particular field?

A. Principally steam power plant for utilities or industrial people.

Q. Has any company for which you have worked been interested in the heavy construction field, so-called?

A. My present company is interested in heavy construction, not as contractors, not as they term contractors.

Q. I see. Are you acquainted with anybody connected with any of the companies, the names of which I called out here?

A. The only name—the only person that I have met is [fol. 167] Mr. Henry J. Kaiser, and that twice only. I am generally familiar with the names of the companies but I do not know any of their present personnel.

Q. And Mr. Kaiser you have described as an acquaintance, you have met him only twice?

A. That is all.

Q. Have you met the defendants at any time, either one of the defendants?

A. No, sir.

Q. In so far as you are aware, do you know any of the friends of the defendants?

A. No, sir.

Q. And no members of the defendants' families?

A. No, sir.

Q. Do you know of any reason why you couldn't, if selected as a juror, be impartial in this case?

A. No, sir.

Q. Have you had any interest in the development of what is referred to as the Delaware Water Supply System?

A. None whatsoever.

Q. Have you followed its progress as an engineer at all?

A. From a purely technical—reading articles in technical magazines; naturally, I have read of the progress, yes, but only in the general interest. I had nothing whatsoever to do with them.

Q. This question will bear on the general inquiry with respect to friends of the defendants.

A. Yes.

Q. Do you know any labor union officials?

A. Yes, sir.

Q. In the construction field?

A. In the construction field, yes, sir. I have had to, naturally, be acquainted with them in handling for my firm some of the contracts which Gibbs & Hill have with certain labor unions, notably the Electrical Workers, and the Steamfitters. In that capacity I have met a number of union officials. [fol. 168] Q. Do you know of any of the officials of the Union of Operating Engineers?

A. No, sir.

Q. Or of the Common Laborers Union?

A. No, sir.

Q. Have you discus-ed Fay or Bove with these union officials at any time?

A. Never.

Q. You had no conversation about them?

A. No.

Q. In connection with your work, have you negotiated with these union officials at any time?

A. Yes, sir.

Q. That is, signed contracts with them, labor agreements?

A. Yes, sir.

Q. And that is your present occupation?

A. My present occupation.

Q. What unions are they again?

A. The ones I have personally dealt with, the International Brotherhood of Electrical Workers through its Washington headquarters office.

Q. Yes.

A. And with the Steamfitters Union in its Washington office.

Q. Yes. Would it embarrass you, if selected as a juror to sit in a case involving labor union officials?

A. No, sir.

Q. And you don't have in your mind at any time that you might have to deal with the union officials in the future, and that therefore you could give less than an open mind to the testimony as you hear it?

A. If selected as a juror I would be entirely open minded, whether I had to deal in the future or not; it would be perfectly all right.

Q. And you wouldn't let any prejudice or sympathy creep into your mind and influence your verdict in the case, Mr. Champion? You understand the question?

A. Yes, sir, I do. The answer is, I would not.

[fol. 169] Q. Now, will you explain the hesitation?

A. Yes. I was just wondering only this: The fact that I happen to know some union officials and have dealt with them, in my own mind I wanted to judge whether I could answer you that it would make no difference in my capacity as a juror. It would make no difference.

Q. You mean you hesitated in order to carefully consider, wanting to be fair to both sides?

A. That is correct.

Q. And you have come to the conclusion that you can be absolutely impartial, is that it?

A. That is my feeling, my belief.

Q. Will you promise me that if you are selected as a juror in this case, that after hearing all the evidence, you are convinced beyond a reasonable doubt that these two defendants are guilty of the crimes charged in the indictment, that you will not hesitate to convict?

A. If the evidence as presented results in that conclusion. I have no alternative but to render my opinion for a conviction.

Q. You have no hesitation in promising that?

A. No hesitation, no, sir.

Q. One question has been suggested to my associate. Where does your firm do construction work, that is, where, geographically?

A. Geographically? Principally Connecticut and Pennsylvania, Indiana and Texas, at the present moment.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Champion, I am going to try to frame my questions so that you can say yes or no to most of them——

A. Take your time.

[fol. 170] Q. And save using up that voice of yours. Have you served as a special juror prior to your being called on this occasion?

A. No, sir.

Q. First time?

A. First time.

Q. How long have you lived in New York?

A. Twenty years, except for two short intervals in Chicago.

Q. Now, have you formed any opinion about this case, by anything that you might have read in the newspapers?

A. No, sir.

Q. Have you ever expressed any opinion as to the innocence or guilt of the defendant Fay?

A. No, sir, I have not.

Q. Now, have you served as a general juror in other types of cases prior to your being called on the special panel?

A. Never served as a juror in any capacity, except as a coroner's jury, witnessing an accident.

Q. Now, you probably know that if you were selected as a juror in this case, as is true in all cases, that the jurors are the sole judges of the facts in the case; right?

A. Yes, sir.

Q. And his Honor is the sole judge of what the law is in the case, applicable to it. And if you are selected in this case to sit as a juror, would you take the law from his Honor in every aspect of this case, regardless of what you think the law is or should be?

A. Absolutely.

Q. What newspapers do you read?

A. Tribune in the morning, the Telegram in the evening.

Q. Have you read any articles prior to the announcement of the opening of this case, about the defendant Fay?

A. No, sir.

Q. Did you hear, while you were seated in the chair, waiting to be called, the various questions put by Mr. Polakoff to the last juror concerning the cloak of innocence [fol. 171] that is thrown about a defendant, and the reasonable doubt that is his—if it exists in the case?

A. I listened to those questions, yes, sir.

Q. And if I put all those questions to you would your answers to be the same as the answers given by the preceding juror?

A. I think that it is a pretty big thing to answer all at once, sir.

Q. All right, I will cut it up for you. If his Honor charges you at the time when you might be selected as a juror in this case, that the People have failed to prove beyond a reasonable doubt the guilt of the defendant Fay, if you have a doubt and you have got the law from the Judge would you hesitate to vote for the acquittal of the defendant Fay under such circumstances?

A. I answer exactly as I did for Mr. Hogan, that if the evidence presented renders my opinion to decide for or against, I am equally ready to express such an opinion as a member of the jury.

Q. All the law that is applicable in the case, whether it be the law on reasonable doubt or any other law that might be given to you, you are going to accept from his Honor without any qualifications on your part, are you not?

A. Yes, sir.

Q. You don't know anybody whose name was mentioned here, outside of the one gentleman you told Mr. Hogan about, do you?

A. No, sir.

Q. And likewise you don't, I presume, know anybody in Mr. Hogan's office?

A. No, sir, I do not.

Q. Have you ever been a complainant in a criminal case?

A. No, sir.

Q. Have you ever acted as a witness in a criminal case against anyone?

A. No, sir.

Q. Have you ever served as a grand juror in this county [fol. 172] or any other county?

A. Never, anywhere.

Q. Do you know of any reason at all, about which inquiry has been made, or any reason about which inquiry has not been made, that would in any way keep you from rendering a fair and impartial verdict for the defendants on trial, or the People of the State of New York, who are the other party to this case?

A. I know of nothing to prevent it.

By Mr. Polakoff:

Q. Mr. Champion, in your business, have you ever had disputes with labor unions?

A. Yes, sir.

Q. Would that fact cause to have any prejudice against men who occupy important positions in labor organizations?

A. It would not cause prejudice.

Q. It would not?

A. No.

Q. In other words, you would treat them here at a trial where their liberty is at stake, with the same fairness that you would treat any other American, is that right, sir?

A. That is correct.

Q. Even though these strikes may have resulted in personal inconvenience or loss to you or your company?

A. They have resulted in such loss, and I am fully aware of their nature and reasons for such losses.

Q. But you feel you are able to lay such losses and inconveniences aside, and give the defendants a fair trial?

A. I have no reason for thinking otherwise, or no alternative but to do so.

Q. I am just asking you, sir. I am not suggesting you [fol. 173] have. I am trying to develop the facts. You heard, I assume, my previous questions to the effect that an indictment is merely a charge against individuals; it is a method of bringing them to trial. Do you feel consciously or otherwise that men who are indicted for crime might or may be guilty of crime?

A. That has nothing to do with their guilt, it is my understanding.

Q. That is correct, sir. In other words, you are prepared to take the testimony from the witnesses, weigh its credibility and take the law from the Court, and then reach a conclusion, giving the defendants the benefit of a reasonable doubt, if you have such a doubt?

A. I will take all the evidence that is presented and consider it fairly and give the opinion which results from that.

Q. Would that judgment or opinion be the same, even though these men may be in a field that you approve or disapprove—I am not interested in that—that you yourself would expect for someone who was a friend of yours, irrespective of their occupation or position in the community?

A. Whatever their position is has nothing to do with anything.

Q. I am quite sure that the prosecution doesn't want any prejudice against any defendant. The defendants don't want any favor. Do you feel, sir, that you could give them a fair and impartial trial, irrespective of whether I have developed any question that might cause you to form an opinion otherwise?

A. Yes, that is correct.

Mr. Fitzsimmons: No challenge for cause.

[fol. 174] By Mr. Hogan:

Q. Mr. Champion, I omitted to ask you one question: Has your company done any work to your knowledge in New Jersey, in and around New Jersey?

A. Yes, sir, they have.

Q. Can you specify where?

A. They had some years ago the construction work in connection with the Pennsylvania Railroad electrification through the New Jersey area. That was quite some years ago.

Q. Was that before your time, sir?

A. Yes, sir.

Q. And the employer of your company was the railroad?

A. That is correct.

Q. And so far as you know, that is the only work that has been done in New Jersey within your recollection?

A. Within my recollection, that is correct.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: Satisfactory to the defense.

The Clerk: Edward L. Champion, arise, put your hand on the Bible, please.

(The talesman was accepted and sworn as Juror No. 1.)

The Court: At this time we will take a recess of maybe five minutes. The juror who has been accepted, and all prospective jurors, please keep in mind that you are not to discuss the case among yourselves, or with anyone else, or permit anyone to discuss it in your presence, or form any opinion as to the guilt or innocence of these defendants [fol. 175] until the case is finally submitted. If anyone

should attempt to talk with you, or talk in your presence, please report that to the Court. A short recess.

(A short recess was taken.)

WILLIAM H. CONBOY, residing at 105 West 95th Street, Manhattan, New York, a talesman, having been previously duly sworn, was called for examination on the voir dire, and examined and testified as follows:

By Mr. Hogan:

Q. Mr. Conboy, were you able to hear the names that were read out?

A. I was.

Q. Do you know any of the persons whose names were given?

A. No.

Q. Do you know the defendants—either of the defendants?

A. No.

Q. As far as you are aware, do you know anybody who is acquainted with the defendants?

A. No, I do not.

Q. And are you acquainted with anybody who works or who is an official of any company, the name of which was mentioned?

A. No, sir.

Q. What is your occupation, Mr. Conboy?

A. I work for the Consolidated Edison Company.

Q. And what do you do there?

A. Work in connection with accounts and complaint work, and relative to bills, by customers.

Q. In what office of the company?

A. In the Bronx, Ryder Avenue, Bronx, Bronx Accounting Center.

[fol. 176] Q. And how long have you been with them?

A. Twenty-three years.

Q. Have you been doing the type of work you are presently engaged in, for most of that period?

A. I have.

Q. By accounts, you mean consumers' accounts?

A. That is right—disputes, where they dispute bills, and investigations in connection with the correctness of the bill.

Q. Do you conduct the investigations also?
A. Yes.
Q. Are you a member of a labor union?
A. We have an independent union.
Q. Is that a company union?
A. That is right.
Q. And do you supervise investigations also?
A. No, I don't. I go through them myself.
Q. Handle them independently, is that it?
A. Handle them independently.
Q. Will you say how much or what fraction of your work is indoors and how much is outdoor work?
A. Well, at the present time it is all indoor work.
Q. Do you have anything to do with the Electrical Union, as such?
A. No—no affiliation.
Q. Do you know of any reason why you could not be fair to both sides in this case?
A. No, I don't.
Q. And you have sat as a juror before, have you?
A. No, I have not, not in—some years ago, in the Supreme Court, in a civil action.
Q. But never in a criminal case?
A. Never in a criminal case.
Q. And did you hear such rules of law as guide us in this court, expressed in the questions of Mr. Fitzsimmons and Mr. Polakoff and myself?
A. I was.
Q. And are you in agreement with those rules?
A. I am.

[fol. 177] Q. At least they—none of them mentioned offend you to such an extent that you could not be guided by them as the Judge charges that you must?
A. That is right.
Q. You do not have any prejudice against the defendants, from anything that you have read, or anything?
A. None whatsoever.
Q. Have you read anything with respect to the case?
A. Why, yes, only what was in the papers the last couple of days.
Q. Have you read anything before the last couple of days?
A. No, I don't recall it.

Q. Did you read anything at the time of the indictment in 1943?

A. No, not that I can recall. I may have, but it did not register in my mind, that is, to the extent that I would remember it.

Q. Yes. Well, are you able to put out of your mind, if you are selected as a juror, any impression that you may have as the result of your reading?

A. I have not formed any impression as a result of my reading.

Q. And you have not had any discussion with respect to the guilt or innocence of these defendants?

A. No, I have not.

Q. And will you promise that if you are selected as a juror you won't permit sympathy to influence your verdict in any way?

A. No, I will not.

Q. Just in the same way, you won't permit any prejudice that you may now have or that you may get during the trial to influence your verdict?

A. That is right.

Q. You would be fair to the defendants and fair to the People?

A. I will be.

Q. And if you are convinced beyond a reasonable doubt that the defendants are guilty, you won't hesitate to vote [fol. 178] for a conviction?

A. Yes, sir.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Conboy, you say you have never had the opportunity of serving when called as a special juror; is that so?

A. I have been called as a special juror, but I have never served.

Q. In other words, you were called several times?

A. Never chosen.

Q. But never chosen?

A. That is right.

Q. And at the time that you were called, you were called to the Court of General Sessions?

A. That is right.

Q. In, probably, murder cases?

A. Murder cases.

Q. You live where?

A. 105 West 95th.

Q. And how long have you been a resident of New York City?

A. I was born in New York City. For a period of time I lived on Long Island.

Q. Where in Long Island did you live?

A. Amityville.

Q. What papers do you read in the morning and what papers do you read in the afternoon?

A. The News and the Tribune. I don't get much chance to read in the afternoon.

Q. The Daily News?

A. Yes.

Q. No doubt, after you received your notice to come and serve as a juror here, you read some articles announcing the opening of this case?

A. Yes.

Q. And particularly, on Monday morning, there was an article in the New York Daily News concerning this case, [fol. 179] written by a man named John Crosson; do you remember reading that article?

A. I don't remember that—I remember reading it—I don't remember who wrote, who bylined it.

Q. As a result of reading that article, did you form any opinion as to the defendant Joseph Fay?

A. No, I did not.

Q. Did anything that you read in that article by Mr. Crosson leave any thoughts in your mind about the defendant Fay, either good or bad?

A. No.

Q. Did you ever read the column named Westbrook Pegler?

A. I read them some years ago, but I discontinued reading them.

Q. Why?

A. Because I am not entirely in——

Mr. Hogan: I object to that.

The Court: I don't think we will go into that.

Mr. Fitzsimmons: I thought we might be interested in knowing.

Mr. Hogan: He can send him a letter.

Q. You are at the present time a member of this company union?

A. It is an independent union, it can't be termed a company union.

Q. You call it an independent union. What is the name of the union?

A. Brotherhood of Consolidated Edison Employees.

Q. Do you hold any office in that union?

A. No, I do not.

Q. Did you ever hold an office in the union?

A. No.

Q. You pay dues, of course?

A. Yes.

Q. Are those dues deducted from your salary?

A. They are.

Q. The check-off system?

A. That is right.

[fol. 180] Q. By the company that you work for?

A. Yes.

Q. How long have you held membe-ship in that union?

A. Since 1937. That was the inception of the union.

Q. You are today a member in good standing?

A. Yes, sir.

Q. Do you attend meetings?

A. Occasionally—not so often.

Q. Did you ever discuss this case with anyone, whether it be in your home, in a club that you belong to, or over at the union hall?

A. Never discussed the case.

Q. Incidentally, your meetings are held on company property, are they not?

A. No, they are not.

Q. Where are they held?

A. They are usually held either down in Manhattan Center or in a hotel at 46th Street.

Q. What hotel?

A. The name of it skips my mind.

Q. You told me that you served as a juror in Supreme Court some years back?

A. Yes, sir.

Q. You told that to Mr. Hogan. Had you ever served on a criminal case?

A. Never.

Q. And you never expressed any opinion about the defendant Fay to anybody at any time?

A. No, I did not.

Q. Did you ever hear of him before you read of him, do you recall, in this case?

A. No. I say I may have read about him at the start of the—the very beginning, before the indictment; but I don't recall it.

Q. 1943?

A. I don't recall it, and I did not discuss it.

Q. I take it you never met him?

A. Never.

Q. Did you ever have any dealings with union officials, [fol. 181] other than the union of which you are a member?

A. No.

Q. You never negotiated any contracts or sat in on any labor disputes of any kind, with union representatives, on behalf of your company, have you?

A. No.

Q. Do you remember, back about five years ago or perhaps a little more, that there was a serious dispute between the Consolidated Edison Company and Local 3 of the Electricians? Do you remember that?

A. I recall it.

Q. Did you have anything to do with the negotiations or any of the conferences that might have been held between the union officials and your company?

A. No.

Q. Did you ever discuss any of the questions involved?

A. No.

Q. You do not know anyone in Mr. Hogan's office?

A. No, sir.

Q. Do you have any relatives who are law enforcement officials, in this city or any place else?

A. No, sir.

Q. Did you ever serve as a grand juror at any time?

A. Never.

Q. Did you ever have the occasion of being a witness in a criminal case?

A. Never.

Q. Or make a complaint against anyone, where it was tried out in court, criminally?

A. No, sir.

Q. How many periods of service did you have in the Supreme Court, when you served? More than one?

A. No, just once.

Q. Did you ever make any application at any time to any labor union, when you were turned down, for membership?

A. No, sir.

Q. Did any member of your family have that experience?

A. No.

[fol. 182] Q. Your job, you told Mr. Hogan, concerns itself mostly with ironing out complaints between consumers and the company with whom they deal?

A. That is right.

Q. For whom you work?

A. That is right.

Q. The nature of it being adjusting accounts and so on. Some of that work, I presume, is done inside the company offices, and some of it outside?

A. Outside—primarily I am inside for the time being.

Q. They all have to do with the work of adjusting these accounts?

A. That is right.

Q. Have you any antagonistic feelings towards labor union representatives?

A. None.

Q. Or labor unions?

A. No.

Q. Or strikes?

A. No.

Q. Or picket lines?

A. No.

Q. Were you ever inconvenienced as a result of any strike or picket line, lockout or walkout?

A. Not that I can recall. There is nothing——

Q. You heard Mr. Hogan outline briefly what the nature of the indictment was and the charges contained therein?

A. I did.

Q. Is there anything about those charges that might form a prejudice in your mind against the defendant Fay?

A. No, sir.

Q. Because of the very nature, or because of the sums involved, or for any other reason that I might not mention here?

A. No, sir.

Q. Have you any prejudice in your mind against the defendant Fay because of the position he occupies in the field of organized labor?

A. No, sir.

Q. If you are selected as a juryman in this case, would you give just as much weight and credence to the testimony of a witness produced by the defense as one produced by the prosecution?

A. Yes, sir.

[fol. 183] Q. In other words, would you apply the same reasoning to the testimony given by a prosecution witness as you would be a defense witness, and vice versa?

A. Yes.

Q. You wouldn't hold that the testimony of one carried more weight, because he was produced by the prosecution than by the defense?

A. No.

Q. Would you, if selected in this case, accept the law from his Honor, regardless of what you think the law is or should be in this case?

A. I would.

Q. Do you realize that in a criminal case the defendants are entitled to have the individual judgment of the twelve men who sit as their peers? You realize that?

A. I didn't quite hear that.

Q. You realize that in a criminal case the defendants are entitled to have the individual judgment of each one of the twelve men who are called to sit as his peers in the case?

A. I understand that.

Q. And if you entertained a reasonable doubt as to the guilt of Mr. Fay, as a result of the evidence that you heard or the lack of it, would you resolve that doubt and give him the benefit of it?

A. I would.

Q. You would not hesitate about it at all?

A. No.

Q. You wouldn't give in to the others, unless they convinced you by reason and logic that their view was correct and yours was wrong, would you?

A. I would stand on my own judgment.

Q. You would not be swayed because there were more jurors having a different opinion from yours, simply because of their number, would you?

A. No.

[fol. 184] Q. You realize that an indictment is merely the means by which a defendant is brought to the Bar of Justice for trial, and that in and of itself has no probative value and is no evidence of the guilt of the defendant? Do you realize that?

A. I understand that.

Q. Do you realize that the defendant is presumed to be innocent until the contrary is shown, after all the evidence is in, beyond a reasonable doubt?

A. Yes.

Q. Do you realize that in a criminal case it is very important for a juror to keep his mind open and free from conclusions, until he hears all the evidence in the case and the charge of his Honor on the law that is applicable to the facts that are adduced at a trial?

A. I understand that.

Q. You realize that. You wouldn't come to any conclusion beforehand; would you?

A. No.

Q. If selected. You wouldn't discuss the case with anybody until you finally joined your brother jurors in the jury-room?

A. That is right.

Q. At the conclusion of the trial.

A. (No response.)

Mr. Fitzsimmons: That is all.

By Mr. Polakoff:

Q. Mr. Conboy, I do not mean to be personal, but you may answer the question if you want to: If you are selected as a juror, and this case takes some time—it is hard to venture a guess, but it will take more than two or three weeks, I believe—would you suffer any financial loss because of the fact that you are a juror?

A. No, sir.

[fol. 185] Q. You said you were a member of an independent union. Was there ever a time when there was a—shall I use the word "fight" or "battle" for jurisdiction, among the Edison employees?

A. There was—not among the employees, but there was a dispute for control.

Q. For control, that is what I mean.

A. Between the American Federation of Labor and the C. I. O. and the Independent Union.

Q. Oh, I see: the three of them were involved?

A. Yes.

Q. And the Independent Union won out?

A. That is right.

Q. That is, the members of the Independent Union. There was a three-cornered fight there?

A. Yes.

Q. I see. Mr. Bove—and I may say Mr. Fay—are affiliated with the American Federation of Labor. Irrespective of how you felt, would the fact that this jurisdictional dispute or control dispute took place cause you to have any prejudice against any individuals connected with the American Federation of Labor?

A. No, it would not affect my opinion.

Q. Would the fact that the indictment charges a serious crime cause you to have any feeling that the defendants might or may be guilty?

A. No.

Q. I understand you to say that you had not served in a criminal case before?

A. No.

Q. Is that correct, sir?

A. I had not. I had never served.

Q. In a criminal case the defendants are brought to trial by means of an indictment that is found by a grand jury. Now, the Court, I am sure, will instruct you that the fact that individuals have been indicted causes no presump- [fol. 186] tion of their guilt; they are presumed to be innocent until proven by witnesses on the stand beyond a reasonable doubt that they are guilty. Would you willingly accept such a ruling from the Court?

A. I would.

Q. And apply it to the defendants?

A. I would.

Q. And would the fact that the indictment alleges that a large sum of money had been unlawfully obtained, cause you to have any greater prejudice than if it had alleged a small sum of money?

A. No.

Q. Of course, if a person is convicted of a crime, whether the amount is small or large, it has a serious effect in the

life of that person; the law does not recognize amount, I mean the law does not intend to create any presumption that because the amount is great the defendant may be guilty. Are you prepared to follow those rulings, if the Court gives them to you?

A. I am.

Q. And give the defendants and the People a fair and impartial trial?

A. I am.

Q. Do you know of any reason, that I may not have inquired about, that would prevent you from giving either side a fair and impartial trial?

A. No.

Mr. Fitzsimmons: Bear with us a moment, Judge.

The Court: Oh, certainly.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The People will excuse the juror.

The Court: Excused by the people.

(Talesman excused.)

[fol. 187] The Court: Is there any objection by counsel if we draw six jurors at a time?

Mr. Hogan: No.

Mr. Fitzsimmons: No.

Mr. Polakoff: No—anything you want.

The Court: Draw six names.

(The following talesmen's names were called out by the Clerk, and the six talesmen were severally duly sworn on the voir dire by the Court: George J. Barnett, Alexander C. Patterson, Jr., Richard S. Brautigam, Millard S. Bondy, Walter R. Butler, Jr., and Harry H. Coon.)

George J. Barnett, residing at 2025 Broadway, Manhattan, New York, a talesman, having been previously duly sworn, was called for examination on the voir dire, and examined and testified as follows:

By Mr. Hogan:

Q. Mr. Barnett, do you know anybody whose name was called in this case?

A. No, I do not.

Q. You do not know the defendants?

A. No, I do not.

Q. What is your occupation, Mr. Barnett?

A. Insurance.

Q. What type of insurance, mainly?

A. Reinsurance it is, really.

Q. What is the name of the company?

A. Chubb.

Q. Chubb and——

A. Chubb & Son.

Q. How long have you been with that firm?

A. A little over a year.

[fol. 188] Q. And what is the nature of your work? Is it solicitation or——

A. No, it is inside work, handling accounts, clients' accounts.

Q. Has that been your field of work for some time?

A. No, it has not.

Q. What did you do prior to going with Chubb & Son?

A. Just before that I was with the Armed Forces induction station at Lexington Avenue.

Q. A civilian employe of the——

A. Yes, that is right.

Q. And what type of work did you do there?

A. Office.

Q. And how long had you been there?

A. Two years.

Q. Prior to that, which would be three years ago, where were you?

A. I was with a concert bureau.

Q. In what capacity?

A. Billing artists, concert work.

Q. Had that been your work for some time?

A. No; before that I was with the New York Times.

Q. And what were you doing with the New York Times?

A. I was in the Advertising Department.

Q. Now, if you had to say what was your major interest, what would you say it is? Is it in the concert field or in the newspaper field?

A. In the advertising, I would say.

Q. Advertising. How long were you with the New York Times?

A. About ten years.

Q. And did you have any dealings with labor unions when you were with the Times, at all?

A. No, I did not.

Q. In your present capacity, do you have any dealings with labor union officials?

A. No, I do not.

[fol. 189] Q. How about construction companies; do you—I take it that most of your business is obtained from other companies; is that it?

A. That is right, yes.

Q. So you don't deal with the person or company insured, directly?

A. No, we do not.

Q. And you are not acquainted with anybody, so far as you are aware, who is employed by or is an official of the companies which may figure in the trial of this case?

A. No, I don't.

Q. Now, you have heard the names of the defendants?

A. Yes.

Q. You know the participants, you know the nature of the charge which is incorporated in the indictment. And have you served as a juror before?

A. Yes, I have.

Q. Do you know the rules that are generally applicable?

A. Yes, I do.

Q. Is there any reason that suggests itself to you at this time, which in fairness you ought to tell me and tell the attorneys for the defendants, with respect to your ability to serve as a juror in this case?

A. I don't know of any.

Q. You haven't any thought in the back of your mind that you think, in fairness, you ought to express to us?

A. No.

Q. And could you, do you think, knowing the law that is being invoked here—that is, the charge is extortion—could you render a verdict on the testimony and only on the testimony in this case?

A. I could.

Q. And without prejudice of any kind?

A. Yes.

Q. And would you promise me that you would not let sympathy interfere with your verdict, if that quality or faculty appeals to you during the trial?

A. No.

[fol. 190] Q. That is, you would be courageous and render a verdict in accordance with your view of the testimony in the case?

A. That is correct, yes.

Q. And if you were convinced beyond a reasonable doubt that the testimony in the case proved the defendants Fay and Bove to be guilty of the crime of extortion, you wouldn't hesitate to convict them of that crime?

A. No, sir.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Barnett, you are with Chubb & Son, are you?

A. I am, yes.

Q. In what capacity do you work there now?

A. I handle the accounts in the reinsurance department, mostly aviation.

Q. You served in the United States Army in 1943, did you not?

A. No; I was with the Armed Forces induction station, as a civilian employee.

Q. As a civilian employee?

A. That is right.

Q. What type of work did you do there?

A. Well, I did administrative work and office work.

Q. Now, what newspapers do you read?

A. I usually read the Herald-Tribune in the morning.

Q. And what afternoon papers?

A. I usually get the Sun at night, sometimes the World-Telegram.

Q. When you were a reader of the Telegram, did you read the articles published therein, by Westbrook Pegler?

A. Oh, I suppose I did, occasionally; I don't know.

Q. Did you ever read any about Mr. Fay?

A. I don't remember, sir.

[fol. 191] Q. Did you ever hear of Mr. Fay before you were called down here to serve today?

A. No, I did not.

Q. When you received your notice a couple of weeks ago, did you have occasion to discuss your possible jury service in this case with any of your friends and associates?

A. No, I did not.

Q. Did any discussion of Mr. Fay crop up in your talk, between the time you received your notice and the time you came down here?

A. No, I didn't talk with anybody.

Q. Did you read any newspaper articles concerning this case, since you received——

A. The only thing I read was that the case was postponed from Monday until today.

Q. That is all you read?

A. That is all I read.

Q. Then it is fair to say that you have formed no opinion of any kind?

A. No, sir.

Q. About the guilt or innocence of these defendants?

A. That is true.

Q. And you have never expressed any opinion to anybody concerning the same?

A. I have not.

Q. You have served as a special juror prior to your call at this term of the court, have you not?

A. Yes. I did, I believe around three years ago.

Q. In General Sessions?

A. Yes.

Q. Was it a murder case?

A. Yes.

Q. That is the only service you had as a special juror?

A. No; I had a couple of others before that.

Q. Murder cases also?

A. Yes, they were.

Q. And prior to that you had service as a general juror?

A. Yes.

Q. In General Sessions. Over how many years would you say your jury service covers?

A. I would say about eight or ten years.

[fol. 192] Q. When you were in the field of booking concert pianists—is that correct?

A. Yes.

Q. Where did you have your office or place of business?

A. It was in the Steinway Building in New York.

Q. On 57th Street?

A. Yes.

Q. And you were in business for yourself at that time?

A. No.

Q. You worked for someone else?

A. Yes.

Q. What firm did you work for?

A. Copley—Richard Copley Concert Bureau—C-o-p-l-e-y.

Q. Did your work in that field take you around the country with various artists?

A. No; it just took me—I went to New England and around New York, in the locale of New York.

Q. How long have you been with Chubb & Son?

A. A little over a year—about a year.

Q. You never worked with them before your present service? You weren't with the firm prior to your present service there?

A. No, I was not.

Q. Have you ever served as a grand juror in this county or in any other county?

A. Yes, I did, some time ago. I don't know how long ago, though.

Q. You did serve as a grand juror?

A. Yes.

Q. Was it prior to Mr. Hogan's term of office?

A. No; I believe he was in his office then—in office then.

Q. Did you get to know Mr. Hogan while you served as grand juror?

A. I just saw him in the court here, that is all.

Q. You never became acquainted with him or——

A. No.

Q. Did you have any close personal friends among any of the assistants on his staff?

A. No, I have not.

[fol. 193] Q. Been close enough to make visits to their homes or they to your home?

A. No; I don't know any of them.

Q. I beg your pardon?

A. I don't know any of them.

Q. Have you ever been a witness in a criminal case?

A. No, I never have.

Q. Have you ever been a member of a labor union?

A. No, I have not.

Q. Did you ever make application to belong to one?

A. No; I never had occasion to.

Q. And have you any unfriendly views towards labor unions?

A. No, I have not.

Q. Or labor union representatives?

A. No, I have not.

Q. Have you any unfavorable views to strikes, lockouts, or walkouts, or picket lines?

Mr. Hogan: I object to that, if your Honor please.

The Court: Well, that is a pretty general. Has he any objection that would influence him or prejudice him against either of these defendants?

Q. As a result of any experiences that you might have had with a strike, for instance, would you have any prejudice against these defendants?

A. I have never had that experience, I don't believe.

Q. Did you ever have any experience at all with a walkout or lockout or picket line?

A. No, I never have.

Q. If chosen in this case, would you be willing to accept every rule of law that his Honor gives to you concerning the law, regardless of how you feel the law is or should be? [fol. 194] A. Yes; of course, I would be guided by the law and the Court.

Q. And you realize, from your prior experience, that if you were chosen as a juror in this case, you, as one of the jurors, will be supreme in judging the facts?

A. That is right.

Q. You realize also that each defendant in a criminal case is entitled to an individual judgment—opinion of each one of the jurors? You realize that?

A. Yes, I do.

Q. If you had a reasonable doubt, if you were convinced that a reasonable doubt existed, either from the evidence or the lack of evidence in this case, would you hesitate to vote for the acquittal of Mr. Fay?

A. No, I would not.

Q. You would not be swayed because other members of the jury might have a different view?

A. No, if I have my own opinion.

Q. You would insist, would you not, that they convince you by logic or fair reasoning that they were right and you were wrong, before you joined them, would you not?

A. Yes.

Q. You would not give in to them, simply because they outnumbered you, if such were the case?

A. No, of course not.

Mr. Fitzsimmons: Thank you, sir.

The Court: No questions by Mr. Polakoff.

Mr. Polakoff: No.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The juror is acceptable to the People.

Mr. Fitzsimmons: Peremptorily challenged by the defense.

The Court: I think at this time we had better take a [fol. 195] recess for lunch; and the juror who has been accepted and all prospective jurors are admonished not to discuss the case among yourselves or allow anyone to discuss it in your presence or discuss it with anyone else, or form any opinion as to the guilt or innocence of these defendants, until the case is finally submitted.

I would also suggest that you refrain from reading any newspaper articles, that you also refrain from discussing any of the questions which counsel have put to you or put to these previous jurors this morning, so that you can take the stand here and be examined, without having anything—conversation of any kind with anybody on any subject connected with the case.

Recess until two o'clock.

(Whereupon a recess was taken until two o'clock p. m.)

Afternoon Session

(The following stipulation was put upon the record:)

Stipulation as to Excused Jurors

The Court: It is stipulated by counsel that any juror excused temporarily by the Court, whose name may be drawn during his temporary absence, the slip may be set

aside and placed in the back of the box at the close of the session, on his return.

[fol. 196] ALEXANDER C. PATTERSON, JR., residing at 123 West 93rd Street, New York City, a talesman, having been previously duly sworn, was examined on his voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Patterson, what is your occupation?

A. Plumbing and heating contractor.

Q. How long have you been in that business?

A. 35 years or more.

Q. Is it your own business?

A. Yes. Well, I am in partnership with my brother, originally it was my father, my brother and myself.

Q. Family business?

A. Yes.

Q. And is it plumbing in apartment houses, of that type, or is it for office buildings, or do you specialize?

A. Office buildings and industrials.

Q. What industrial companies do you service?

A. Well, we don't exactly service them. We make new installations in them.

Q. How large a company is it, how many people do you employ?

A. Well, until the present time, about fifteen.

Q. What work are you doing at the present time, are you doing any particular job right now?

A. Yes, we have several. We have an installation at the Beverly Laboratory at Pearl River; air-conditioning in their animal experimentation building.

Q. Where is that again, Pearl River?

A. Pearl River.

Q. You supervise that work yourself?

A. I am supervising that job.

Q. Do you know the defendants in this case, Mr. Patterson?

A. I have been trying to make up my mind. Mr. Fay looks very familiar to me, but I have been trying to place [fol. 197] him all morning. I don't know if he recognizes me or not.

Q. He sits next to Mr. Fitzsimmons, with glasses on.

A. Yes. Either I know him, or he bears a strong resemblance to somebody I know. I have been cogitating all morning.

Q. A facial resemblance; that is, you don't recall having had any business with him at any time?

A. No. I was wondering if I went to school with him or played ball against him, or——

Q. Where did you go to school?

A. I went to public school in 89th Street, 166; and DeWitt Clinton High School.

Q. How about the second defendant, Bove?

A. No, I don't know him.

Q. Have you had any business dealings with any of the firms whose names have been mentioned?

A. No. I haven't had any jobs, I don't think, with them. I have estimated for Walsh, but I don't think we ever did anything for them.

Q. That is the Walsh Construction Company of Iowa, Davenport, Iowa.

A. No. I thought it was Walsh of New York here.

Q. No. The home office is in Davenport, Iowa, and they are in what is known as the heavy construction field. Would that be the same?

A. Yes, foundation builders and so forth.

Q. Tunnels, things of that type. Where is the office of the Walsh Company that is familiar to you?

A. I don't recollect. I get so many of these bids cards and so forth, I don't recall.

Q. Are your employees members of a union?

A. Yes.

Q. Do you know the union officials of their particular union?

A. I do, the steamfitters and plumbers unions.

[fol. 198] Q. Have you at any time had conversations with those officials with respect to the defendants in this case?

A. No.

Q. How long have your employees been members of the union?

A. Well, that is hard for me to tell, when they joined.

Q. Didn't you have to sign an agreement at the time?

A. Oh, yes, yes.

Q. How long have you had what is known as a closed shop?

A. Well, signing these agreements I think is fairly recent. I would say that is in the last twenty years.

Q. Has anything happened during that period that would give rise to a prejudice against union leaders?

A. No.

Q. You haven't had anything of a disagreeable nature which would make you just a little biased one way or the other?

A. No, I believe not.

Q. You think that you could be fair and impartial in this case?

A. Oh, I think so.

Q. Am I correct in concluding that you have some little doubt about it, inasmuch as you said that you "believe" you could? Was there a doubt in your mind at that time? If so, be very frank with us, and be fair to both sides?

A. Well, of course that would depend on what twists and turns the testimony might take.

Q. That is something in the future, and you can't speculate on it.

A. Yes.

Q. But as you sit there now, and reviewing your dealings with union officials, in fairness to the defendants and in fairness to the People, is there anything that occurs to you that would make you look with doubt or suspicion on the testimony of the witnesses brought forward by either side in this case?

A. No.

Q. And that is a candid, fair answer, and to the best [fol. 199] of your ability you don't think that the fact that you deal with these officials would weigh at all in making up your mind with respect to the guilt or innocence of these defendants?

A. That is correct.

Q. Is there anything else, Mr. Patterson, that occurs to you, that you think either side ought to know?

A. I can't think of anything.

Q. You have heard me describe the indictment?

A. Yes.

Q. You haven't any prejudice against or sympathy for the invocation of that law?

A. No.

Q. You wouldn't let prejudice or sympathy interfere with your duty as a juror?

A. No.

Q. And you would base your verdict on the testimony as it comes from the witnesses in this case?

A. I would.

Q. I think this next question is a variation, if you please, of something I have already asked you, but it is in an effort to get at the truth and may suggest something else to you. Is there anything in your relations with labor unions that would make it embarrassing or difficult for you to sit as a juror in this case?

A. Well, that is what I referred to when I said the evidence might take turns that would——

Q. You mean it would be suggestive of an experience of your own, is that it?

A. Possibly.

Q. And to that extent would you then, do you think, by taking a seat in the jury-box if you were acceptable to both sides, have the scales just a little tilted in the direction of one side or the other?

A. I wouldn't say that. I would try to treat everybody fairly.

Q. But there is an impression in your mind, if I may so characterize it, born of some experience of your own——

A. Not necessarily that, but it is possible it might cause [fol. 200] some embarrassments through personal dealings or acquaintances.

Q. Well, when that thought occurred to you, was it associated with the second thought that possibly you did know the defendant Fay?

A. Yes, that was in my mind.

Q. But you are unable to tell us at this time whether you know him or not?

A. You often see a face, and sometimes there is a doubt afterwards before you recall who the person was, and just when the case develops I might remember who he is, or if I do know him at all.

The Court: Suppose you did come to the conclusion, if you were accepted as a juror, that you had met Mr. Fay at some time in the past; would that influence you in your verdict?

The Talesman: It wouldn't influence me, no, except that doubt.

The Court: Is there anything in your present relations with unions or members of unions that would affect you, bias you in any way against the defendants, or in favor of the People?

The Talesman: None at all.

Q. And if recollection provided an impression or opinion, you have no doubt of your ability to lay that opinion or impression aside, Mr. Patterson?

A. That is right.

Q. And you promise that if you are selected as a juror that you will base your verdict solely on the testimony in this case?

A. Yes.

Q. And you would have no difficulty, if you believed the testimony showed beyond a reasonable doubt that the [fol. 201] defendants were guilty, in finding a verdict of guilty?

A. Yes.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Patterson, you told Mr. Hogan that you believe you estimated for a Walsh Company in New York. This Walsh Company that may be involved in this indictment is the Walsh Construction Company, having its principal place of business in Davenport, Iowa, and they have a branch office in New York. The names are Thomas J. Walsh, David Small, J. Henry Gill, William A. Durkin, and Edward P. Walsh, and John S. MacDonald. Those are the officers of that company. Is that the company you have done estimating for?

A. I believe it is, but I didn't know any of them personally.

Q. Were you awarded the contract that you estimated on?

A. No. I never did any work for them.

Q. In other words, you merely offered an estimate to them?

A. Yes.

Q. And it was not accepted?

A. That is correct.

Q. Someone else got the job. All these other names of officials and all the other names of companies you heard me read, you have never done any business with at all?

A. No.

Q. And you don't know any of them?

A. No.

Q. Now, Mr. Fay lives in Newark, New Jersey, born on Long Island, never went to that public school that you mentioned, and never went to DeWitt Clinton High School. I merely mention that as long as you mentioned the other facts, so that might a little more clearly fix in your [fol. 202] mind the person you may have had in mind as Mr. Fay. So far as you know, you definitely had no dealings with Mr. Fay, did you?

A. Oh, no.

Q. And your work is what type of work?

A. Plumbing and heating.

Q. And as plumbing and heating contractor, you have never come in contact with any officials of the International Union of Operating Engineers at any time?

A. No.

Q. And you did no work on this Delaware Water Supply contract, did you?

A. No.

Q. Now, did you form any opinions or have you any views on the guilt or innocence of Mr. Fay in this case?

A. No.

Q. When did you first hear about the case, or read about it?

A. I read it several years ago.

Q. At the time the indictment was returned, no doubt?

A. I believe so.

Q. That was in 1943. And have you ever discussed the case or the defendant Joseph Fay with anybody, whether it be members of your family, your club associates, or business associates?

A. Oh, no.

Q. Now, have you ever been a witness in a criminal prosecution of any kind?

A. No.

Q. Did you ever act as a witness in a criminal case?

A. No.

Q. Did you ever serve as a grand juror?

A. No.

Q. How many times prior to this call have you been asked to serve on a special jury?

A. Probably fifty times?

Q. How many?

A. Probably fifty.

Q. When did you last serve?

A. Well, I don't remember the year.

Q. Approximately. I am not interested in the year.

A. Say three or four years ago.

[fol. 203] Q. And that was probably in General Sessions, was it?

A. General Sessions.

Q. Murder case?

A. Yes.

Q. Now, you served prior to that time, I guess?

A. Yes.

Q. Was it in General Sessions?

A. General Sessions.

Q. Civil cases from time to time?

A. Yes.

Q. From your experience as a juror, sitting in the criminal part of this court, you are at least a little bit familiar with some of the general rules that apply to criminal cases?

A. Yes.

Q. If you were selected in this case as a juror, would you promise us that you would take all the law in the case from his Honor, as he charges it to you, regardless of what your opinion is about the law?

A. I would, yes.

Q. And would you decide the case entirely upon the facts you received from the various witnesses who testified in this case?

A. I would.

Q. You wouldn't let any other outside consideration or thought influence you in any way?

A. No.

Q. You wouldn't have any prejudice against the defendants, or any sympathy for them?

A. No.

Q. Have you done any reading of any kind as a result of which any unfavorable impression rests in your mind against either of these defendants?

A. No.

The Court: Any challenge for cause?

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The juror is excused by the People.

(Talesman excused.)

[fol. 204] Richard S. Brautigam, residing at 205 East 78th Street, New York City, a talesman having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Brautigam, what is your occupation?

A. Sales promotion and advertising work with the American Can Company.

Q. And how long have you been that?

A. I have been with that for nine years.

Q. Prior to that were you associated with any company?

A. Prior to that I was idle for two, two and a half years, due to a rather severe illness. And before that I was with the duPont organization, whom I joined when I graduated from college in 1927.

Q. With the American Can Company are you engaged in any field work?

A. Well, under normal times, yes, I am out most of the time. For the past two years I haven't been so much.

Q. Will you describe in a little more detail your work on the outside?

A. My work has been concerned principally with new products. For instance, I started in when the beer can was brought out, and I brought that along. Of course, several years ago we stopped making beer cans for civilians, so I haven't had anything to do along those lines. Recently most of my work has been concerned with post-war developments and planning.

Q. When you go to the field, do you go to the factories of the American Can Company?

A. Very seldom, very seldom.

Q. Your work doesn't bring you in contact with labor union officials?

A. No. For the most part my work is with our customers. [fol. 205] Q. Are you acquainted with any labor union officials?

A. No, I am not.

Q. Do you know anybody whose name was mentioned in this case?

A. No, I do not.

Q. Have you had dealings with any of the companies, the names of which were read off?

A. No, I haven't.

Q. Do you know anybody who works for or is an official of one of these companies?

A. As far as I know, I don't.

Q. And in the nine years you have been with the American Can Company have you resided in New York City?

A. I have.

Q. Have you read anything with respect to this case that has formed an opinion or impression in your mind?

A. No. I have formed no opinion or impression.

Q. Have you served as a juror before?

A. I have.

Q. You are familiar with the rules?

A. I am.

Q. And is there any doubt in your mind that you could sit in this case and be impartial and fair to both sides?

A. No, there is no doubt in my mind.

Q. And if you are satisfied beyond a reasonable doubt that the defendants are guilty, you wouldn't hesitate to convict?

A. If such were the case, yes.

Q. If you had a reasonable doubt, you would acquit?

A. Yes.

Q. You wouldn't let any sympathy or prejudice influence your decision one way or the other?

A. I don't think that I would.

Q. Now, without being prompted by a question, is there anything that you would like to volunteer? You have heard [fol. 206] the questions put by Mr. Fitzsimmons, Mr. Polakoff and myself. Does anything occur to you that you think

would be helpful to anyone concerned here, in deciding whether to accept or reject you as a juror in this case?

A. At the moment I can think of nothing.

Q. I see.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. May I have the spelling of your name?

A. B-r-a-u-t-i-g-a-m.

Q. That was the name that was mispronounced this morning when you were called?

A. That is the one, which was readily corrected.

Q. By you?

A. By me, right.

Q. Have you had any prior service as a special juror, prior to your call at this term of the court?

A. I have not.

Q. Have you served as a general juror in any of our courts?

A. I have served.

Q. In what courts?

A. Federal District Court.

Q. Southern District of New York?

A. Southern District.

Q. How many times did you serve there?

A. One term.

Q. That is your only jury experience?

A. That is correct.

Q. Have you ever served as a grand-juror in this county?

A. I have not.

Q. Or any other? Were you ever the complainant in any criminal case?

A. No.

Q. Were you ever a witness in any criminal case?

A. No.

Q. Has your entire business career been with the American Can Company?

A. No.

Q. Well, were you with someone else prior to that time? [fol. 207] A. I have just explained I was with the duPont organization.

Q. Prior to your being with the American Can?

A. That is correct.

Q. How long were you with duPont?

A. From 1927 until 1932.

Q. Did you generally do the same type of work that you do now?

A. I was in sales work. I was first with the rayon division, and then with the cellophane division of duPont, doing sales advertising work.

Q. You are a college man, I take it?

A. Yes.

Q. Was that your first job after getting out of college?

A. That was my first one.

Q. How long have you resided in New York City?

A. Since 1936.

Q. Where did you reside previously to that?

A. In New Jersey.

Q. What part of New Jersey?

A. Montclair, Essex County.

Q. Were you born there?

A. I was born there.

Q. You lived there up to 1936?

A. Off and on.

Q. What afternoon papers do you read, sir?

A. Well, I read most of the papers, but my regular afternoon paper is the New York Sun.

Q. As the result of any of your readings have you formed any prejudice against Mr. Fay?

A. I know nothing about the defendant and I have formed no feeling one way or the other about him.

Q. Did you ever read anything about him except what was in the papers the last few days concerning the start of this trial?

A. I remember there was something about it at the time the indictments were made. Beyond that it made no particular impression on me.

[fol. 208] Q. So that I could sum it all up by saying that your only reading about Mr. Fay was first at the time or around the time of the indictment, and secondly, around the time when you received your jury notice?

A. I should say.

Q. At the start of this proceeding?

A. I should say——

Q. At the start of this proceeding.

A. —that is pretty accurate.

Q. And as the result of your readings no prejudice is in your mind at the present time against him?

A. None is.

Q. If you were chosen here to sit as a juror in this case, would you deal with the facts fairly and impartially, without fear or favor, and do a good job? Is that the way you feel?

A. That is the way I feel.

Q. Your service in the Federal Court took you, no doubt, into the criminal branch as well as the civil branch, I presume?

A. That is correct.

Q. So that you have some familiarity with the general rules of evidence that apply in criminal cases?

A. I have.

Q. You have heard generally the questions that I put to several of the other jurors concerning reasonable doubt, presumption of innocence, the effect of an indictment. If I were to repeat them all to you, would your answers be any different, or would your answers be any different to any of those questions?

A. No, I don't think they would be.

Q. Would you, too, take the law entirely from his Honor, as given to you, regardless of how you feel the law is or should be?

A. I would.

Q. The facts you will accept strictly as the ones allowed [fol. 209] by the Court, coming from the mouths of the various witnesses who testify?

A. Yes.

Q. Have you ever had any unfavorable experience that might create a prejudice in your mind against either of the defendants, as the result of strikes, lockouts, walk-outs, or picket lines?

A. The defendants wouldn't be involved, but I certainly was inconvenienced at the time of the elevator strike a few years ago, and had to walk a good many flights.

Q. I take it that your office was on one of the higher floors?

A. That is correct, sir; and home.

Q. And your home at 205 East 78th Street. You were inconvenienced?

A. I was.

Q. And naturally you didn't feel good about it?

A. I did not.

The Court: You wouldn't take that out on these defendants?

The Talesman: I prefaced my remarks with that.

Q. The union that was involved in the strikes that caused you this displeasure, of course, wasn't the union that either one of these two defendants is connected with. You know that, you have heard that here?

A. Yes.

Q. As a result of your experience you wouldn't harbor any feeling of prejudice against these men simply because they are connected with the unions?

A. I would not.

Q. Do you have any serious thoughts in your mind concerning the relative qualities of the American Federation of Labor and the C. I. O. that might form a prejudice in your mind against either or both of these defendants?

A. I can answer "No" to that.

[fol. 210] Mr. Fitzsimmons: Thank you, sir.

The Talesman: May I ask the gentleman a question?

Q. I thought you were finished, sir.

A. I didn't know whether you were finished. You haven't asked me several questions that you have asked other people.

Q. All right.

A. Namely, what do I think about labor unions.

Q. I would like to hear what you think.

Mr. Hogan: I object, your Honor. We are not interested unless there is something in your mind that would prejudice you against these defendants, because they happen to be officers——

The Talesman: Well, there wouldn't be.

Q. But you have certain definite thoughts in your mind concerning labor unions?

A. I have.

Q. You have had them for some time?

A. That is true.

Q. You have thought about them?

A. That is true.

Q. And as the result of your thoughts about them you have reached certain conclusions and determinations concerning labor unions?

A. Yes, yes.

Q. Now, comes a time when you are called to qualify as a juror in a criminal case where both defendants are leaders in their respective unions. Would your thoughts and decisions which you have arrived at, due to your thinking about the problem of labor unions form any feeling that would prevent these men in the slightest degree from get-
[fol. 211] ting a fair and impartial trial as the law intends them to get?

A. I think not.

The Court: Are you sure about it?

The Talesman: Not entirely.

The Court: Excused.

(Talesman excused.)

MILLARD S. BONDY, residing at 393 West End Avenue, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Bondy, maybe you can shorten our work by volunteering anything that has occurred to you. Is there any thought that has occurred to you, that you think Mr. Fitzsimmons, or Mr. Polakoff or I ought to know about, or start questioning you about?

A. Not in particular, no.

Q. Then bear with me while I will repeat the questions, which must seem routine to you by this time. What is your occupation, Mr. Bondy?

A. Real estate.

Q. How long have you been in the real estate field?

A. Twenty years.

Q. And what firm are you connected with?

A. Myself; that is at the present time.

Q. How long have you been working for yourself, Mr. Bondy?

A. About five years.

Q. Prior to that time you were associated with what company?

A. Joseph Milner & Company.

[fol. 212] Q. And your office is located where now?

A. 223 West 79th Street.

Q. Are you associated with anybody at that address?

A. Well, I am in the office with some one in real estate transactions. Most of my work is with brokerage, though—selling, and was management at one time.

Q. But in the last five years since you have been operating for yourself, it has been buying and selling pretty much?

A. Somewhat; and brokerage, yes.

Q. Do you own property yourself also?

A. Not at the present time, no.

Q. Do you know anybody whose name was mentioned at any time during the proceedings as a participant, or possible witness in this trial?

A. I do not.

Q. Are you acquainted with anybody connected with one of the companies mentioned?

A. No, I am not.

Q. Have you served as a juror before?

A. Not in recent years.

Q. How long ago would you say it was?

A. 1917.

Q. In a criminal trial?

A. No, Supreme Court, is my recollection.

Q. Have you read anything about this case in the papers?

A. I did a few years ago.

Q. Did that form any opinion in your mind?

A. No.

Q. With respect to the guilt or innocence of the defendants?

A. No. I had forgotten about it until recently.

Q. So that at the present time you need make no effort to get anything out of your mind in order to be fair to both sides in this case?

A. I know nothing about the details. The names are just a bit familiar, that is all.

[fol. 213] Q. Were you born in this city, Mr. Bondy?

A. I was born in Albany, of this State.

Q. How long have you resided in New York City?

A. Since 1901, outside of eight years in which I lived in Washington. I lived here straight from 1925.

Q. In connection with your work in the real estate field, have you met various labor union officials?

A. No, I have not.

Q. So that so far as you know, you are not on a friendly basis with any friends of the defendants?

A. No.

Q. Do you have any doubt, Mr. Bondy, that you can be fair to both sides in this case?

A. I believe I could.

Q. If you are convinced beyond a reasonable doubt that the defendants are guilty of the crime charged you will without hesitation convict them?

A. Yes, sir.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Bondy, I think I heard you say that you hadn't sat in a criminal case before. Am I correct, sir?

A. I have not.

Q. Well, you know, Mr. Bondy, that according to our law on criminal procedure, a man is brought to trial by means of an indictment, and that indictment is found by a grand jury who, of course, hears only one side of the case. I mean, only the People are represented before the grand jury. Now, would the fact that because a person was indicted, cause you to have any prejudice against that person?

A. It would not.

[fol. 214] Q. In other words, you realize that that is a charge and an accusation?

A. I do.

Q. Which must be proven beyond a reasonable doubt before you can convict the defendant?

A. That is right.

Q. If you have a reasonable doubt, if the Court so instructs that it is your duty to give that reasonable doubt to the defendant, to give him the benefit of it, would you do so?

A. Yes, sir.

Q. Mr. Bondy, have you had any unpleasant or unfavorable experience, directly or indirectly, with organized labor?

A. Well, not directly. I have——

Q. I mean, I want an answer. You don't have to give me the details.

A. No, not directly.

Q. Do you have some indirectly?

A. Well, inconveniences, yes.

Q. You wouldn't hold that against any defendant on trial, would you?

A. I would not.

Q. In other words, irrespective of your views as to the merits or demerits of the particular situation, your mind would be free and open as far as this case is concerned?

A. I believe so.

Q. Have you any fixed opinion concerning organized labor, and just answer that yes or no—I don't want the details.

A. Well, it is pretty hard to answer that. I will say offhand, no. In individual cases I have.

Q. Considering the individual cases, would they be such they would cause you to have any prejudice against anyone who was an official or connected with organized labor?

A. No.

Q. You understand what I am trying to get at, Mr. Bondy. That is, whether your mind is open, free and fair, so that [fol. 215] these defendants can get an impartial trial, without favor, but at the same time without prejudice. And your answer would be that your mind is in such a condition?

A. My mind is open.

Q. Irrespective of what you may have read or heard about this case. I assume you have formed no opinion that you cannot lay aside now that you are in the jury box?

A. I have not.

Q. And do you know any reason I may not have covered, that would prevent you from giving either side, the People or the defendants, a fair and impartial trial?

A. I know of none.

Mr. Polakoff: No challenge for cause.

By Mr. Hogan:

Q. Mr. Bondy, you said that at one period in your business life you managed apartment houses?

A. Yes, sir.

Q. Did you have any dealings with labor union officials at that time?

A. I did not directly, but the people I was associated with did.

Q. Thinking back five years, I think you said——

A. Well, I have done that more recently than that, too.

Q. As a result of this indirect connection with labor union officials, do you have any opinion or impression that you couldn't put aside?

A. No.

Q. Do you recall the names of the labor union officials with whom you had to deal?

A. I do not. I didn't come in direct contact with them. I simply effected the management.

Q. I think you probably have given me the answer to this, if you don't mind repeating it: What company was it you managed property for?

A. I managed property for Joseph Milmer & Company and the General Realty & Utilities.

[fol. 216] Q. General Realty & Utilities?

A. That is a real estate organization.

Q. Were they apartment houses or office buildings?

A. Both. My end of it was apartment houses.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: Peremptorily excused by the defendants.

(Talesman excused.)

Walter R. Butler, residing at 470 West End Avenue, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Butler, how long have you resided in New York County?

A. Thirty years.

Q. Were you born here?

A. No, sir.

Q. Where?

A. Haverstraw, New York.

Q. Are you acquainted with anybody who is named as figuring in the proceedings so far?

A. No, sir.

Q. Do you know anybody employed by any of the companies that it is suggested will figure in the testimony?

A. No, sir.

Q. What is your occupation?

A. I am an apartment house superintendent; manager.
Q. In what section of town?
A. 470 West End Avenue.
Q. And how long, sir, have you worked in that capacity?
A. Eight years.
Q. Eight years?
A. Yes, sir.
[fol. 217] Q. Prior to that?
A. A real estate broker.
Q. With what firms?
A. Builders Homes Company, one of my own companies.
Q. Is that in New York City, too?
A. Jamaica, New York.
Q. I see. How long had you been in that business?
A. 1925.
Q. 1925 until what date again?
A. 20 years practically. That is prior to the eight years I served as a manager and superintendent.
Q. 1925 to 1937, then, roughly?
A. That is right.
Q. And where *is* your office during that period?
A. On Sutton Boulevard.
Q. What type of buildings did you manage?
A. We weren't managing buildings. We were building one-family and two-family houses; in the general brokerage business.
Q. Was it contracting also?
A. Yes, sir.
Q. Had you had experience in the building line before setting up your own concern?
A. In the real estate line, yes, sir.
Q. Did you during that period come in contact with labor officials at all?
A. Well, I was a building superintendent on the property. The office did more or less, yes, but I didn't.
Q. Did I understand you to say that it was your own business at one period of time?
A. Yes, sir.
Q. During the entire period or just a portion of it?
A. Entire period.
Q. And then in addition to having an ownership interest in it, you served as the building superintendent?
A. That is correct.

Q. Is the business still in operation?

A. No, sir.

Q. Now, as an apartment superintendent, do you direct [fol. 218] the activities of help in the apartment house?

A. Yes, sir.

Q. And serving in that capacity, have you had any dealings with labor union officials?

A. Well, I am superintendent of B-32; that is the Building and Service Employees International Union, yes, sir.

Q. You are a member of that union?

A. I am not a member of that. I am a member of the Apartment House and Superintendent Managers, Local #219.

Q. Well, is that asociated with 32-B in any way?

A. No, sir.

Q. You know that my office prosecuted officials of 32-B?

A. Well, I have heard of it, yes, sir.

Q. Would that fact influence you one way or the other?

A. No, sir.

Q. You haven't any prejudice against the office for any such action it took in those cases?

A. No, sir.

Q. And you haven't any prejudice against the defendants because it just so chanced that the defendants in that case were union officials?

A. No, sir.

Q. Is there any reason that occurs to you with respect to your ability to be impartial in this case, that you would like to tell us about at this time?

A. No, sir, I don't think there is.

Q. You have heard all the questions asked?

A. Yes, sir.

Q. And you have no reservation with respect to your ability to sit and impartially judge the facts in this case?

A. That is correct, sir.

Q. And you wouldn't permit prejudice or sympathy to influence your verdict, whatever it might be?

A. No, sir.

Q. And if selected as a juror in this case and you [fol. 219] honestly believe that the testimony proves beyond a reasonable doubt that the defendants are guilty, you wouldn't hesitate to convict them?

A. No, sir.

Q. Now, you have given me the number of the Local 202, is it?

A. 219.

Q. Is that Union associated with the Building Service International?

A. That is correct.

Q. So that it is an affiliated local?

A. Affiliate of the A. F. of L.

Q. Yes, as is Local 32-B?

A. No, no connection with 32-B; separate local entirely.

Q. But isn't it the same International?

A. The same International.

Q. And did you meet at any time the officials of that International Union?

A. I am on the executive board, sir, and I have met several of them.

Q. The executive board of your own union?

A. That is correct.

Q. Have you met a Mr. McFettridge?

A. Yes, sir.

Q. Did you know George Scalise?

A. I didn't know him, no, sir.

Q. Do you remember that he was vice-president, International vice-president of that union?

A. I do, yes, sir.

Q. Were you active in your local?

A. No, sir. We only had a charter since 1942.

Q. And you are positive that the action of our office so far as it dealt with the International of which your local is an affiliate, wouldn't prejudice you in any way?

A. I think your office did a good job.

Q. Thank you very much.

Mr. Hogan: No challenge for cause.

[fol. 220] By Mr. Polakoff:

Q. Would the fact that Mr. Hogan's office did a good job in the case referred to by him cause you to feel that perhaps the defendants in this case are guilty and have committed the crime they are charged with?

A. Sir, I judge this case on its merits.

Q. You have of course no prejudice against people being officials of labor unions, being an official yourself, is that correct?

A. That is correct.

Q. And you would be prepared to give the defendants here the same kind of trial, if through unfortunate circumstances you found yourself in trouble that you would expect from the hands of your fellow citizens, is that right?

A. That is correct.

Q. Have you served in a criminal case before?

A. No, sir.

Q. You may have heard me say this before, but I will repeat it in view of the fact that you haven't served in a criminal case. Would you draw any inference as to the guilt or innocence of a defendant merely because he stands indicted in court and charged with a serious crime?

A. No, sir.

Q. You realize that according to our method of enforcing criminal law, and because of our criminal procedure, a man is brought to trial by means of an indictment; which is voted or found by a grand jury, at which grand jury only the People are represented.

A. Yes, sir.

Q. And there is a presumption created by law that the defendants are innocent until proven guilty beyond a reasonable doubt. Are you prepared to give the defendants in [fol. 221] this case the benefit of the presumption of innocence?

A. Yes, sir.

Q. And if you are selected as a juror, you will start with an open mind, believing that the defendants are innocent, and it is the duty of the prosecution to prove them guilty beyond a reasonable doubt, before you may convict the defendants?

A. That is correct.

Q. Have you heard anything about this case?

A. No, sir.

Q. Have you read any article which might influence your decision?

A. No, sir.

Q. —one way or the other concerning the guilt or innocence of these defendants?

A. No, sir.

Q. Do you know of any reason why either side could not get a fair trial?

A. No, sir.

Q. Under our form of criminal law a defendant need not prove himself innocent. Do you understand that to be so?

A. Yes.

Q. And you would bear that in your mind throughout——

A. Yes, sir.

Q. (Continuing)—your hearing the evidence from the witnesses?

A. That is correct.

Q. Would the fact that the indictment charges a crime in a considerable sum of money, over a half million dollars, have any effect on your judging the testimony in this case?

A. No, sir.

Q. Were you involved in any factional dispute in your own local union?

A. No, sir.

Q. Your local union was in no way involved in an International dispute such as occurred in 32-B, is that right?

A. No, sir.

Q. The fact that there were jurisdictional disputes, and proof may be offered that there was serious trouble due to jurisdictional disputes on the Aqueduct job, would that [fol. 222] have any influence upon you in reaching a conclusion in this case?

A. No, sir.

Q. Even though the disputes may have unjus' y caused injury or financial loss to certain companies or individuals?

A. Would you repeat that?

Q. (The question repeated by the stenographer as recorded.)

A. Can you clarify that a little bit?

Q. Yes. Where a dispute took place, no matter which side was right or wrong, the employer suffered loss. You understand that, don't you?

A. Yes.

Q. Would the fact that an employer suffered loss cause you to have any prejudice against the defendants if they were involved in the jurisdictional dispute?

A. No, it wouldn't.

Q. You understand what I mean, sir. Being a labor man, and you feel, if selected as a juror, that you could give both sides a fair and impartial trial?

A. Yes, sir.

By Mr. Fitzsimmons:

Q. How long have you been with Wood Dolson Company?

A. Five years.

Q. What was your business before that time?

A. Well, I was in the same business, but not with the same company, for three years prior to that.

Q. What firm were you connected with then?

A. Earle & Calhoun.

Q. Is it fair to say that has been the business you followed during most of your business career?

A. No, only eight years I have been doing that.

Q. What did you do before that?

A. I had my own company; Builders Homes Company.

[fol. 223] Q. How long have you been an official of this union?

A. Since it was organized.

Q. That is about two years, three years?

A. Two and one-half years ago.

Q. Do you have occasion from time to time to meet the International head of the union, Mr. McFettridge?

A. That is right.

Q. Then you know him personally?

A. Well, I have met him several times.

Q. You know him since he has held the office as president of that union?

A. Well, I have known him for two years.

Q. Have you ever—you told us you never served as a juror, either as a special juror or a general juror, prior to your call this term; that is correct, isn't it?

A. That is right.

Q. Have you ever served as a grand juror?

A. No, sir.

Q. Were you ever a complainant in a criminal case?

A. No, sir.

Q. Did you ever act as a witness in a criminal case?

A. No, sir.

Q. Now, is there anything that might suggest itself to you, either from the questions that Mr. Hogan, Mr. Polakoff or myself asked you, that you might like to tell us about, which might affect your qualifications one way or the other to sit on this case?

A. Well, I don't believe so.

Q. You told some one of the examining counsel that you formed no opinions about the guilt or innocence of the defendants?

A. I can't hear you, sir.

Q. You formed no opinions as to the guilt or innocence of these defendants?

A. No, sir.

Q. Prior to your coming here?

A. No, sir.

Q. I think you said you did no reading, outside of some little reading two years ago when the indictment was [fol. 324] returned?

A. No, sir, I didn't say that.

Q. What reading did you do then?

A. I didn't do any reading.

Q. None at all?

A. That is right. That is about this case.

Q. Well, about any of the people involved in this case?

A. No. I never knew——

Q. Mr. Fay or Mr. Bove?

A. Never knew about them until Monday, when I was in this court.

Q. And you haven't expressed any opinions or formed any opinions since Monday—between Monday and today?

A. No, sir.

Q. Thank you, sir.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The People will excuse Mr. Butler.

(Talesman excused.)

HARRY H. COON, a talesman (residing at 255 West 84th Street, Manhattan, New York), was then examined on the voir dire as follows:

Examination by Mr. Hogan:

Q. Mr. Coon, do you know any of the persons whose names have been mentioned?

A. Well, I know you and Mr. Gelb from being on a case you were interested in.

Q. You served as a special juror previously?

A. Yes, sir.

Q. Was that in the Hines case?

A. Yes, sir.

Q. And so far as I know, you haven't met me at any time but——

A. No other time.

[fol. 225] Q. Does that go for Mr. Gelb also?

A. That is true.

Q. Do you know anybody connected with the case?

A. No one.

Q. You do not know the defendants?

A. No.

Q. Have you had dealings with any of the companies, the names of which have been mentioned?

A. Not at all.

Q. What is your occupation, Mr. Coon?

A. I am central office manager for the Holmes Electric Protective Company.

Q. And in that capacity what is your daily routine, would you say?

A. Supervision of operation and the repair of burglar alarms.

Q. How long have you been in that position, sir?

A. Twenty-one years.

Q. Have you read anything about this case?

A. Oh, I just casually read of it at the time of the indictment.

Q. Did your reading at the time of the indictment or any reading that you have done with respect to the case, cause you to form any opinion?

A. No,—made no impression at all.

Q. You have an absolutely clear mind with respect to the guilt or innocence of these defendants?

A. That is true.

Q. Have you had any negotiations or contact with labor union officials?

A. None at all.

Q. Do you supervise men, with the Holmes service?

A. Yes.

Q. Is there a union?

Well, they have a so-called independent union.

Q. More or less of a company union?

A. That is true.

Q. So that you haven't had any dealings with labor union officials?

A. None at all.

Q. And do you have any doubt that you could be fair and [fol. 226] impartial to the prosecution and to the defendants in this case?

A. None at all.

Q. And you would not permit sympathy or prejudice to influence you in considering your verdict?

A. No.

Q. And if you believed that the testimony proved that the defendants were guilty beyond a reasonable doubt, that you could convict?

A. That is true.

Q. And if you had that reasonable doubt, of course, you would acquit?

A. Yes.

Mr. Hogan: No challenge for cause.

The Court: I think, before you start, Mr. Fitzsimmons, we will take a short recess. The jurors will please remember the admonition not to discuss the case or form any opinion, nor allow anybody to discuss it in their presence.

(Whereupon, a short recess was taken, after which the trial was resumed.)

By Mr. Fitzsimmons:

Q. Mr. O'oon—is that right?

A. Yes, sir.

Q. What Hines trial did you serve on, the first or the second?

A. The second.

Q. And you have served as a special juror prior to that time, I presume?

A. Yes, sir.

Q. On a number of occasions?

A. Well, yes, about twenty years.

Q. Were you connected with the State Normal School at one time?

A. Not connected with it; I went to it.

Q. Where is that State Normal School located—at Albany?

A. Cortland, New York.

[fol. 227] Q. Cortland, New York. And I take it, from the name, that it develops teachers; is that right?

A. It does.

Q. You were an instructor at one time in one of the schools then?

A. No. I had a narrow escape, but I got out.

Q. And you were successful in escaping?

A. Yes.

Q. How long have you been with this Holmes Protective Corporation?

A. Twenty-one years.

Q. How many times have you appeared as a witness in a criminal case?

A. Never.

Q. Never. And have you ever served as a Grand Juror?

A. No.

Q. You heard all the questions that were asked concerning the general rules of law that are applicable to criminal cases?

A. I did.

Q. And you are quite familiar with them, through your experience?

A. Yes, sir.

Q. Is there any answer that you might give, that would aid us in determining whether to accept or reject you, other than what you have already told us?

A. I think not.

Q. Do you hold any views that would be prejudicial against either one of these two defendants?

A. None at all.

Mr. Fitzsimmons: Thank you. No challenge for cause.

Mr. Hogan: The juror is acceptable to the People.

Mr. Fitzsimmons: Peremptorily challenged by the defense.

(Talesman excused.)

The Court: Draw six more.

The Clerk: Jurors, kindly answer and step forward, please, as your name is called. Cecil E. Colyer, Clinton W. [fol. 228] Parker, Myron F. Decker, Martin Ostriker, Richard M. Dublon, Edward M. Clevan.

(The six above-named talesmen were then sworn collectively by the Court, and thereafter examined.)

Cecil E. Colyer, a talesman (residing at 4966 Broadway, Manhattan, New York), was then examined on the voir dire as follows:

Examination by Mr. Hogan:

Q. Mr. Colyer, will you give us your occupation, please?

A. I have a trucking business.

Q. You own business?

A. My own business.

Q. And how long have you been in the trucking business?

A. Oh, twelve or thirteen years.

Q. How many men do you employ?

A. None. I hire trucks. I own no trucks of my own, I hire trucks.

Q. And then you have contracts with companies for motor haulage?

A. One company—motor haulage, yes. Motor Haulage is the company I hire my trucks from, too.

Q. You hire the trucks from Motor Haulage?

A. That is right; and I only do trucking for one company, the General Electric Company.

Q. General Electric Company?

A. Internation General Electric Company.

Q. In connection with your work then, you do not have contact with labor union officials?

A. No, not with the officials, just with the men.

Q. How long have you been in this business?

A. Twelve or thirteen years.

Q. Prior to that what was your occupation?

A. I was export manager for Servel Corporation, the refrigerator people.

[fol. 229] Q. And for the last ten or twelve years you have resided in this county?

A. I have been in New York for about eighteen or nineteen years.

Q. Where were you born, sir?

A. New York City.

Q. Have you read anything about this case, either at the time of the indictment or recently?

A. The only one that I recall is the Monday paper, the day we were called down here.

Q. This week?

A. This week.

Q. Did that form any strong opinion in your mind?

A. No.

Q. You haven't any impression that you could not easily lay aside?

A. I have no impression of it whatsoever.

Q. And you could be impartial, fair to both sides?

A. Yes.

Q. And has any question that has been asked by Mr. Fitzsimmons, Mr. Polakoff, or myself, suggested anything to you that you think would be informative and helpful in making up our minds as to whether or not you were desirable from the standpoint of the People and the defendants in this case?

A. Well, only the opinions about labor officials in general, perhaps.

Q. Well, have you any opinion with respect to labor officials that would create bias against any man on trial?

A. No, no—not a bias, no.

Q. Well, when you signed your questionnaire you said that you had the ability to lay aside any opinion or impression which was created by newspaper reading or from any other source?

A. That is right.

Q. And you have no doubt of your present ability to do that?

A. No, I have not doubt.

Q. And you wouldn't let sympathy or prejudice influence [fol. 230] your verdict in any way?

A. No.

Q. And you appreciate that the persons selected as jurors in this case are the sole judges of the fact, and it is their responsibility and their duty to call the verdict as they see it?

A. I understand.

Q. And that if the People carries out its burden and proves to the jurors beyond a reasonable doubt that the defendants are guilty as charged, the verdict should be one of guilty?

A. That is right.

Q. And you wouldn't hesitate to so find?

A. No.

Q. On the other hand, if we fail in that undertaking and you do have a reasonable doubt, you would be just as strong in your conviction that your verdict should be one of not guilty?

A. That is right.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Colyer, in your trucking business, as I understand it, you hire both the trucks and the labor that goes with the trucks?

A. That is right.

Q. There has been some difficulty from labor in the trucking field of recent years in New York; you are familiar with that difficulty?

A. Yes, that is right.

Q. And as a result of that difficulty, I assume you are paying more for the trucks plus the labor than you formerly had?

A. That is so.

Q. And there has also been some question as to whether or not certain charges by labor were properly fixed?

A. That is right.

Q. Is that right?

A. That is right.

[fol. 231] Q. You know what I am talking about?

A. That is right.

Q. Hasn't that incident left an impression upon you concerning labor?

A. An impression? It has left an impression, yes.
Q. Has it left a prejudice?
A. Prejudice, no.
Q. What sort of impression has it left?

Mr. Hogan: I object to that, your Honor.
Mr. Polakoff: I mean, I want to get a characterization.

By the Court:

Q. Have you any impression, from your relationship with labor, which would prejudice you in arriving at a fair verdict in a case of this kind, where two labor officials are charged with a particular crime?
A. No. Do you want more of an answer?

Mr. Polakoff: Yes, if you will.
The Talesman: Any prejudice or anything that I think regarding labor, I have my opinions regarding labor and labor organizations, but I can't see where that would affect what I would find out in the case of these two men.

By Mr. Polakoff:

Q. But your opinion towards labor and labor organizations is unfavorable, isn't it?

Mr. Hogan: I object to that, your Honor.
The Court: Sustained.
[fol. 232] Mr. Hogan: It has no place in this court-room.

By the Court:

Q. No matter what your opinion about labor is, would you, if accepted as a juror, after listening to the testimony, decide this case upon the evidence, without regard to whether or not these two gentlemen happen to be officers of a labor union or not?
A. Yes.

By Mr. Polakoff:

Q. Mr. Colyer, sometimes, in our desire to evaluate our own ability to lay aside prejudices if we have them, we have to give a great deal of thought to that, don't we?
A. Yes.
Q. And sometimes, even when we hope and believe that we are able to do that, there might remain a lingering doubt

as to whether we can really accomplish that result. Is there such an attitude in your mind?

Mr. Hogan: Your Honor, that is already answered. Your Honor, he said that he had no doubt of his ability to lay aside any impression that he might have.

The Court: He may answer the question.

A. I have no doubt.

Q. You are positive of that?

A. I am positive of that.

Q. Are you positive that despite any opinion that you may have formed concerning labor, organized labor and its officials, that you could give the defendants the benefit [fol. 233] of all reasonable doubts that they are entitled to according to law?

A. I believe I can.

Q. You have sat in criminal cases before?

A. I have.

Q. How long ago was the last one?

A. Two years.

Q. Two years. Was it on a special panel?

A. Yes.

Q. How long have you been on a special panel?

A. Oh, about eighteen years.

Q. Were you a grand juror before that?

A. No.

Q. Have you ever served on a Grand Jury?

A. No.

Q. Have you ever served on a Federal Jury?

A. No.

Q. Have you ever served in civil cases?

A. No.

Q. During your eighteen years you have been called strictly for criminal cases?

A. Always General Sessions.

Q. Were you in any—did you sit as a special juror in any other cases than murder cases?

A. Yes, sir.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: Satisfactory.

Mr. Polakoff: I challenge him peremptorily.

(Talesman excused.)

[fol. 234] CLINTON W. PARKER, a talesman, (residing at 10 Park Avenue, Manhattan, New York), was then examined on the voir dire as follows:

Examination by Mr. Hogan:

Q. Mr. Parker, do you know any of the persons whose names have been called?

A. I do not.

Q. And have you had dealings with any of the companies, the names of which have been mentioned here?

A. None of them.

Q. And your occupation is——

A. A banker.

Q. And what bank is it, sir?

A. The Dime Savings Bank of Brooklyn.

Q. And so far as you know, none of the persons whose names have been mentioned, none of the companies, deal with that bank?

A. I think not.

Q. How long have you been with that institution?

A. Twenty-eight years.

Q. Have you served as a juror before?

A. But not in this court—in the Federal Court.

Q. And were you born in New York?

A. Born in Boston.

Q. Had you read any newspaper accounts of this case?

A. I have read nothing at all.

Q. So you have no impression or opinion at all with respect to the guilt of innocence of the defendants?

A. That is right.

Q. The answer is "No"?

A. No.

Q. Do you know of any reason why you couldn't be fair and impartial in this case?

A. No, I don't.

Q. And you wouldn't permit sympathy or prejudice to influence you in any way?

A. I think not.

Q. And if the defendants are proven guilty beyond a reasonable doubt, you would not hesitate to convict them?

A. No, sir.

[fol. 235] Q. You are familiar with the rules of law, which require the People to satisfy the jurors to that extent?

A. I think so.

Q. And if the People do not meet that undertaking, then of course, you would be just as ready to acquit the defendants?

A. That is right.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Parker, you have heard most of my questions before, have you not?

A. I have.

Q. And have you any answer to any of them, that you think might influence either side in determining whether you could be a fair juror?

A. I don't think anything in particular.

Q. You have been working for this one bank for 28 years?

A. 28 years.

Q. I understood you to say that you had served in the Federal Court as a juror?

A. That is right.

Q. For how many years?

A. Two and three years—one and three years ago.

Q. That is the first time you have served?

A. The first time.

Q. You have served both in civil and criminal cases in the Federal Court?

A. That is right.

Q. It has the central jury system, and jurors are sent both to civil and criminal courts?

A. Yes.

Q. And you have had experience in both kinds of cases?

A. That is right.

Q. And therefore you have some experience with the rules of procedure in criminal cases?

A. Yes, sir.

[fol. 236] Q. What position did you have, if any, prior to working for the bank?

A. I taught school.

Q. In New York City?

A. No,—in Massachusetts.

Q. In Massachusetts?

A. That is right.

Q. I assume you are a college graduate?

A. Well, Massachusetts School of Art in Boston.

Q. You taught art?

A. That is right.

Q. Do you know of any reason why you can't give the defendants, as well as the People, a fair and impartial trial?

A. No, I do not.

Q. Have you any definite opinions concerning organized labor and its leaders? You may answer that yes or no.

A. No, I have not. I think I might be what you would call a liberal, although I am a banker.

Q. Therefore, I assume that you feel that you are in a position to decide this case purely on the evidence as you hear it from the witnesses, without any undue influence from any source whatsoever?

A. I think so.

Mr. Polakoff: No challenge for cause.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: Satisfactory to the people.

Mr. Fitzsimmons: Peremptorily challenged by the defense.

The Court: Excused by the defense.

(Talesman excused.)

[fol. 237] Myron F. Decker, a talesman (residing at 137 East 38th Street, Manhattan, New York), was then examined on the voir dire as follows:

Examination by Mr. Hogan:

Q. Mr. Decker, will you tell us your occupation?

A. I am employed by the Metropolitan Life Insurance Company.

Q. In what capacity, sir?

A. I am in the Actuarial Division, doing research work of a mathematical and statistical nature.

Q. How long have you served as an actuary with the Metropolitan Life?

A. I have been with the Metropolitan since 1925—nineteen and one-half years.

Q. And that has been the nature of your work during that period?

A. That is true.

Q. Do you know any of the persons whose names were read out this morning?

A. I do not.

Q. And have you had dealings with any of the companies that——

A. I have not.

Q. None of those persons have policies which have come across your desk?

A. I would have no knowledge of that at all.

Q. You do not deal with the policies direct, but operate on statistics which the company is interested in; is that it?

A. That is correct.

Q. Have you served as a juror before?

A. Yes, I have.

Q. Have you read anything about this case?

A. I have a vague recollection of having read about the indictment, maybe a year or two or three years ago.

Q. Well, did it create any impression, which was vague or otherwise?

A. No; I merely recall the names.

[fol. 238] Q. You haven't, as you sit there, any impression with respect to the guilt or innocence of these defendants, have you?

A. No.

Q. So that, if selected, you could sit in the case without bias or a predisposition to find the defendants guilty or innocent?

A. That is true.

Q. And your verdict, in the final analysis, would result solely from the testimony that is brought out by the witnesses that will be produced in the case?

A. That is correct.

Q. Can you think of any reason—we have asked a great many questions; I am sure they have suggested a great many lines of thought to you—do you know of any reason why you could not be fair to both sides in this case?

A. I cannot.

Q. And after all the testimony has been taken and the Judge has charged the jurors, if you are a member of the jury at that time, would you promise counsel for the defense and myself that you would not permit prejudice or sympathy to influence your verdict in any way?

A. I would so promise.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. You are, Mr. Decker, an actuary with the Metropolitan Life, are you?

A. I am employed in the actuarial division. I am not technically an actuary.

Q. And Metropolitan Life Insurance Company had some dealings with labor unions, on a rather large scale, a year or two ago, did they not, when one of the unions tried to organize their employees? Do you know anything about that matter?

A. I know very little about it. I have no direct knowl- [fol. 239] edge of it, so far as my connection with the Metropolitan is concerned.

Q. You have never handled any of the negotiations or——

A. I have never——

Q. (Continuing:) —sat in on any of the conferences pertaining to that matter, did you?

A. I had nothing to do with it. It did not involve organizing home office employees.

Q. Now, you say you read very, very little about this case —some reading about the time of the indictment. Did you do any reading since you received your jury notice?

A. I did not.

Q. And what paper—what afternoon papers do you read?

A. I read the Sun.

Q. Have you ever served as a Grand Juror?

A. I have not.

Q. How many times have you served since you have been on the special jury panel?

A. Once.

Q. How long ago was that?

A. About a month and a half ago.

Q. A murder case, I presume.

A. It was.

Q. You actually served?

A. Yes.

Q. You were on the jury?

A. Yes, I served.

Q. Now, as a result of any reading that you have done, or as a result of any talking that you have done with any of your friends or associates, have you formed an opinion about labor and labor leaders? Just yes or no to that.

A. No.

Q. So that it is fair to say that you have no prejudice against labor unions or labor leaders?

A. That is correct.

Q. And you have never expressed any opinion, particularly about Mr. Fay or Mr. Bove?

A. Oh, absolutely not.

Q. Either of them?

A. Certainly not.

Q. And you have never set up any opinion in your own mind about this matter?

A. No.

[fol. 240] Q. Have you ever appeared as a plaintiff in a criminal case?

A. No.

Q. And your service has been in the Court of General Sessions?

A. Correct.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: Peremptorily challenged by the defense.

(Talesman excused.)

Martin Ostriker, a talesman (residing at 451 West End Avenue, Manhattan, New York), was then examined on the voir dire as follows:

Examination by Mr. Hogan.

Q. Mr. Ostriker, is there anything that you want to volunteer, as a result of listening to all of these questions?

A. Well, in my capacity as sales manager and personnel manager of the firm that I am connected with now for the past fifteen years, we did have some labor discussions.

Mr. Polakoff: I can't hear him.

Mr. Hogan: I will ask that the answer that has been given be read.

(The answer was repeated by the stenographer.)

Q. Did it get beyond the discussion stage?

A. No.

Q. Well, did you participate in the discussions?

A. I did.

[fol. 241] Q. Did it leave any lasting impression, that you would have difficulty in setting aside, if you——

A. No.

Q. And this is by way of telling me your connections with labor?

A. That is true.

Q. Have you had any connections, other than that, with labor officials?

A. None.

Q. And you haven't any opinion that would make it difficult for you to sit as a juror in this case?

A. No.

Q. Have you had experience as a juror?

A. Three prior experiences.

Q. So you know what——

A. Oh, yes.

Q. (Continuing:) —what a juror faces; and you think that you could sit in this case and be fair and impartial to both sides?

A. I do.

Q. Do you know any of the persons whose names were mentioned?

A. No.

Q. And you have not had dealings with any of the companies?

A. No.

Q. Tell me something about your occupation. What is the nature of your work?

A. Well, our business is rayon business—converters of rayon textiles. We convert these fabrics and sell them to dress manufacturers. Now, my connection with the labor angle is in the fact that I handle the personnel, such as hiring the help and firing the help, if there is any of it. And I think it goes back about three or four years ago—and I am not certain as to what local it was, but it was a local of the C. I. O. that wanted to organize our particular firm. And the one that I refer to was when I took my employees down there to the local, had a discussion—a very friendly sort of thing—nothing ever came of it, and that was the end of it.

Q. How many persons do you employ, sir?

A. Oh, roughly, sixty.

[fol. 242] Q. And the name of the company?

A. Duplex Fabrics, Incorporated.

Q. How long have you been with them?

A. Fifteen years.

Q. And prior to that?

A. In the same industry.

Q. Do you know the number of the local in the C. I. O.?

A. I think it is 65; I am not certain.

Q. I don't know whether I have asked you this: Did you become acquainted with the officials of that local?

A. I met them, yes.

Q. You have never discussed with the officials of that local or with anybody else the defendants in this case?

A. Oh, no. This goes back five years ago.

Q. You haven't any doubt that you could be impartial, if selected as a juror in this case?

A. No doubt.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Does your firm presently have a contract with the C. i. O. local that you bargained with?

A. No, sir.

Q. Have you ever been a member of a labor union?

A. No.

Q. What papers do you read?

A. The Morning Times, the Morning Mirror, the Post and the P. M.

Q. And have you read anything about this case?

A. Just this morning in the Times there was a small article.

Q. And as a result of what you read in the papers, would [fol. 243] you say that you have a prejudice against either one of these defendants, as a result of what you read?

A. No.

Q. You served as a special juror prior to your service this time?

A. You mean in General Sessions?

Q. Yes—any time.

A. Yes; two prior occasions in General Sessions.

Q. You sat on two cases in General Sessions?

A. Yes.

Q. How long ago was the last one?

A. Oh, I guess about seven years ago—six or seven years ago.

Q. Have you ever been the complainant in any criminal case?

A. No.

Q. Have you ever served as a Grand Juror?

A. No.

Q. You no doubt were seated here all day and you heard various questions that were put to the prospective jurors by counsel, and especially those questions having to do with the general rules of law that were spoken about. Is there anything in the nature of the answers given by the other prospective jurors, that would in any way change your answer, if those questions were put to you?

A. No.

Q. If you were selected in this case, would you accept the law from his Honor?

A. I would.

Q. Regardless of what you thought the law should be?

A. I would.

Q. And would you accept the facts from variour witnesses, as those facts were allowed in evidence by the Court?

A. I would.

Q. Have you ever expressed any opinion about the guilt of innocence of either one of these two defendants to anyone?

A. No.

Q. Have you ever formed an opinion of any kind in your [fol. 244] mind regarding the guilt or innocence of either one of these defendants?

A. No, sir.

Q. Is there anything else now that you might like to volunteer, along the lines of the questions that we asked other jurors, that might guide us either accepting or rejecting you?

A. Only what I have volunteered.

Q. What you have told us?

A. That is right.

Q. Nothing else?

A. Nothing else.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: Satisfactory to the People.

Mr. Fitzsimmons: Satisfactory to the defense.

(The talesman was accepted and sworn as Juror No. 2.)

RICHARD M. DUBLON, a talesman, residing at 236 West 70th Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. What is your occupation, Mr. Dublon?
A. I do investment work.
Q. And for what company?
A. Myself.
Q. And where is your office?
A. I have no office. I operate through several brokers.
Q. In stocks and bonds?
A. Real estate.
Q. How long have you been so engaged?
A. Actively since about 1939.
Q. And prior to that, 1939, what did you do?
A. Recreation work.
Q. For the City?
A. No—privately.
[fol. 245] Q. Camps and boys' schools?
A. That is right—a recreational group in this city.
Q. Does that private investment take all your time?
A. Most of it. I do a good deal of work, voluntary, for the Red Cross and the United Hospital Fund.
Q. And do you know of any reason why you could not sit and be fair and impartial in this case?
A. No.
Q. Do you know any of the persons whose names have been read out?
A. No, I know none of them.
Q. Have you had any dealings with any of the companies?
A. No.
Q. You have lived all your life in this city?
A. That is right.
Q. How old are you?
A. I will be forty next month.
Q. And prior to taking up this recreational work, what did you do?
A. I was in the cotton converting business for a little less than three years.
Q. What firm was that?
A. It is now the United Merchants.
Q. In what years was that?
A. 1922 to 1925.

Q. And after that it was recreational work?
A. That is right.
Q. Till 1939?
A. That is right.
Q. Have you served as a juror before?
A. I have.
Q. In criminal cases?
A. One case was started, and we did not sit.
Q. Well, you needn't tell us the disposition of it; but you have been a member of a jury?
A. That is right.
Q. On more than one occasion?
A. No; only on one occasion in criminal, but prior to that in Supreme and in Municipal.
[fol. 246] Q. Have you read anything about the facts of this case?
A. No, I haven't read a thing.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Dublon, I didn't hear all your answers, so if I repeat a question or two, kindly forgive me. Have you sat before as a special juror?
A. I have.
Q. Did I understand you to say, on one occasion?
A. That is right.
Q. And was that your only experience as a special juror?
A. As a special juror.
Q. Have you acted as a juror in the Federal Courts?
A. No.
Q. State civil courts?
A. In the civil courts, yes.
Q. And from your previous experience as a juror in a special case, you are familiar with the different rules of procedure affecting criminal cases?
A. Yes.
Q. From those of civil?
A. That is right.
Q. Have you had any contact directly with organized labor?
A. No.
Q. Have you any fixed opinions concerning organized labor or its representatives?

A. No.

Q. Have you any prejudice that would influence your reaching a determination in this case?

A. No, I have none.

Q. You have heard most of the questions heretofore put by counsel?

A. That is right.

Q. Can you enlighten us, or is there anything you would like to enlighten us about, that might help us in determining whether to select you as a juror or not?

A. No, I have no special——

[fol. 247] Q. Do you know of any reason, that we have not inquired into, that might affect you, if you are sitting as a juror, either for the People or for the defendants in this case?

A. I can think of none.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The People will excuse Mr. Dublon.

The Court: Excused by the People.

(Talesman excused.)

Edwin M. Clevan, a talesman, residing at 390 Riverside Drive, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Clevan, did any name mentioned this morning ring a bell in your memory?

A. No, it did not.

Q. You haven't any friendship or acquaintanceship with anybody whose name was mentioned in the case?

A. No one.

Q. And your occupation, sir?

A. I am a salesman.

Q. In what type of business?

A. Well, we handle starches, pastes, gums, and glues of all kinds.

Q. Food stuffs more——

A. Well, it is not entirely. Some of it goes in the food field, but some is used industrially.

Mr. Polakoff: We did not hear that over here; I am sorry.

Mr. Hogan: Will you read the last answer?

[fol. 248] (The last answer was repeated by the stenographer.)

Q. And the name of the company?

A. Stein, Hall & Company, Incorporated. It is two names.

Q. And how long have you been with Stein, Hall & Company?

A. Thirty years.

Q. And are you an outside salesman?

A. That is right.

Q. And your accounts are what?

A. Well, I call on textile mills, wholesale grocers, wholesale druggists, steam laundries—people of that type.

Q. I take it you have no dealings with labor union officials?

A. No, I do not.

Q. And that you haven't any opinions or impressions with respect to it, arising from your work?

A. No; that is true.

Q. Have you any opinions or impressions arising from *our* reading, of any kind—that is, with respect to this case?

A. No, I have none.

Q. Have you done any reading with respect to the case?

A. Well, I read about it in the past two or three days.

Q. But it formed no impression with respect to the guilt or innocence of the defendants?

A. Not at all.

Q. Have you served as a juror before?

A. I have.

Q. In General Sessions?

A. Yes.

Q. Do you think that you can be fair and impartial, if selected as a juror in this case?

A. I think I could, yes.

Q. Is there any doubt in your mind, in giving that answer?

A. None whatsoever.

Q. And if you concluded that the People had proved these defendants guilty beyond a reasonable doubt, you [fol. 249] would not hesitate to convict them?

A. No, I would not.

Q. And you would not permit sympathy or prejudice to influence your verdict in any way?

A. No.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Clevan, what is your occupation? I didn't hear the——

A. A salesman.

Q. For what firm? A. Stein, Hall & Company.

Q. What do they sell?

A. They sell starches, pastes, gums, glues—a very varied line.

Q. And they are not manufacturers?

A. Yes, they are.

Q. They are?

A. That is right.

Q. Well, as such do they employ labor or help to manufacture their products?

A. Yes, they do.

Q. And are you familiar with whether or not they have contracts, union contracts, with various types of workers in their plant?

A. I believe they are dickering now with one of the——

Q. Where is their plant?

A. One is in Long Island City, another in Chicago.

Q. Do you believe that until recently there has been no organized labor organization in either of their plants?

A. Well, I can say for certain that here in Long Island City they did not have any. I wouldn't know about Chicago.

Q. Was it an open shop, so-called?

A. Yes.

Q. Has there been any effort to organize the shop in Long Island City?

A. I believe there is some—something going on about it at the present time. I am not familiar with it. I do not [fol. 250] come in contact with that phase of the business at all.

Q. In other words, you do not take any part in executive policy——

A. That is right.

Q. (Continuing:) —that might affect its relations with labor; is that right?

A. That is right.

Q. Have you any definite opinions concerning organized labor or its representatives?

A. No.

Q. Neither favorable nor unfavorable?

A. No.

Q. Neutral?

A. Yes, I would say I am.

Q. Therefore, you feel you are in a position to give the defendants, who are members of organized labor, a fair and impartial trial?

A. Yes.

Q. Having served before in numerous criminal cases, you are familiar with all the rules protecting defendants in criminal cases?

A. Well, I don't think I said I served in numerous cases.

Q. Well, did you serve before on three cases in the last number of years?

A. I have served on two cases in General Sessions.

Q. Special panels?

A. That is right.

Q. Were they murder cases?

A. Yes.

Q. Have you had experience as a civil juror also?

A. That is right.

Q. And the two cases that you served on were the only cases which you served in criminal cases?

A. From my memory, yes.

Q. Have you ever been a member of a Grand Jury? Or have you ever been a member of a Federal Jury?

A. No.

Q. Do you know of any reason why you can't give both the defendant and the People a fair and impartial trial?

A. None whatsoever.

Q. Either directed by questions to you, or perhaps which I have omitted to ask, which you might think of; is that right?

A. No.

[fol. 251] Q. There is nothing in your mind, whether I ask about it or not, that you feel would influence you one way or the other in this case?

A. No; I have no prejudice one way or the other.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The People will excuse Mr. Clevan.

(Talesman excused.)

The Court Jurors and prospective jurors, we are about to take a recess till tomorrow morning at ten o'clock. I would suggest, there being so many jurors to attend, that you try to get here a little before ten, so that the roll can be taken, and that will expedite our trial. And please remember not to discuss the case among yourselves or with anyone else, or permit anyone to discuss it with you or in your presence, or form any opinion about the matter; and it is just as well if you did not read newspapers for a few days. Recess until tomorrow morning at ten o'clock.

The Clerk: Bail continued for both defendants.

(Whereupon a recess was taken until Thursday, March 1, 1945, at 10 o'clock a. m.)

[fol. 252]

Room 1530,
Criminal Courts Building,
New York, N. Y.,
March 1, 1945.

(Trial continued pursuant to adjournment.)

The Clerk of the Court: Jurors will kindly answer and step forward as your name is called.

James H. M. Ewart.
Edward Falk.
Sidney A. Keiffer.
John F. Kachmar.
Julius M. Schiff.
Leonard M. Johnson.

(The respective talesmen were then sworn collectively by the Court, and thereafter examined:)

James H. M. Ewart, residing at 70 East 96th Street, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Ewarts, I understand you are with a bank or trust company.

A. That is correct.

Q. What is the name of it, please?

A. I am trust officer of the New York Trust Company.

Q. And you have expressed to his Honor some reluctance to sit in this case because of a connection with the Walsh Construction Company?

A. That's correct, and with members of the family of [fol. 253] David Small, and New York Trap Rock Corporation.

Q. Will you explain what that connection is?

A. We are trustee of various trusts, for members of Mr. Small's family. The principal assets of those trusts have been Walsh Construction Company's stocks from the inception of the trust. We also have had accounts of the New York Trap Rock Corporation, and I believe they have had loans, though I do not know whether any are outstanding now.

Q. If any of those persons were called as witnesses, it would be difficult and possibly embarrassing for you to pass on the credibility of everything that was said by them?

A. I feel that it might be, yes.

Mr. Hogan: The People will consent——

The Court: Yes, excused.

(Talesman excused by consent.)

EDWARD FALK, residing at 300 West 109th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Falk, I don't know whether you can recall the names that were read out yesterday, but undoubtedly as they were read you were asking yourself if you knew them?

A. Yes.

Q. Do you know anybody whose names were called?

A. No, sir, but I know a brother of one of the defendants. That is Arthur Fay.

[fol. 254] Q. A brother of the defendant Fay?

A. That is right.

Q. And what is the first name of the brother?

A. The first name is Arthur.

Q. And what business is Arthur in?

A. He is in the insurance business, and so am I.

Q. And what company are you with?

A. The Public Service Mutual Insurance Company.

Q. And I believe you have been a special juror in one case in which I participated?

A. I have, that's right.

Q. Other than that I don't think we have met at any time?

A. No, that is right.

Q. Now, except for your acquaintance, or would you call it a friendship with Arthur Fay——

A. I would call it an acquaintance, that is all.

Q. Is there anybody else whose name was called——

A. None.

Q. (Continuing.) —that you know of?

A. None.

Q. And have you had any dealings or business with any of the companies whose names were mentioned?

A. No, sir.

Q. Is your relationship with Mr. Fay a business relationship?

A. Yes.

Q. And do you obtain business from him?

A. No, I don't.

Q. Is it the reverse—you give business to him?

A. Well, our company obtains business from him.

Q. Your company——

A. Our company does, yes. I don't personally. I am an agent for our company.

Q. I see. Mr. Falk, would your acquaintanceship with Arthur Fay, and the fact that your company obtains business from him——

A. Yes.

Q. (Continuing.) —make it difficult for you to sit with [fol. 255] an open mind in this case?

A. Well, I don't know. I mean, that is rather hard to say. I would make every effort that it shouldn't, or that it wouldn't.

Q. I beg pardon?

A. I would make every effort that it wouldn't have any effect or bearing, and I believe it wouldn't. But I wouldn't say for certain. It may have some effect that I wouldn't

be able to control, that is all. I mean, I am not certain about that.

Q. Do you feel now that it would be embarassing for you to sit in the case?

A. It might be.

The Court: I think I will excuse the juror.

Q. Thank you for your frankness.

(Talesman excused.)

SIDNEY A. KEIFFER, residing at 230 Central Park West, New York, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Keiffer, do you know any of the persons whose names were called out?

A. I do not.

Q. Have you had dealings with any of the firms?

A. No, I have not.

Q. And what is your business, Mr. Keiffer?

A. My business is real estate and textiles.

Q. How long have you been in the real estate business?

A. Probably twenty years.

[fol. 256] Q. And what portion of your attention is given to real estate, and what portion to textile?

A. At the present time more is given to the textiles than real estate.

Q. Is that in the manufacturing end?

A. Textiles in the manufacturing end, yes.

Q. How long has that been a matter of concern to you, the textile business?

A. About five years.

Q. What is the name of the textile company?

A. Davis & Catterall.

Q. And the office of that company is in New York City?

A. 40 West Street, yes.

Q. Do you have manufacturing plants also?

A. Over in Jersey.

Q. Where in Jersey, sir?

A. Passaic.

Q. And have you had that plant over there for five years?

A. Oh, I don't own any part of the plant, you know. Of course they have had it longer than that.

Q. And your connection with the company that owns the plant has been five years?

A. Yes.

Q. What type of real estate business do you have, sir?

A. Commercial property.

Q. Lofts?

A. Lofts.

Q. And office buildings?

A. And offices, primarily.

Q. In connection with your real estate business, do you have dealings or negotiations with labor union leaders?

A. Yes, sir.

Q. In the building service?

A. Primarily in the building service, yes.

Q. Have you at any time discussed the defendant Fay or the defendant Bove with any of these labor union leaders?

A. No.

Q. Have you met labor union leaders in connection with the textile business?

A. No.

[fol. 257] Q. Just what is your connection; at is, what do you contribute to the textile industry, what is your function?

A. I am a salesman.

Q. So in that connection you would not have dealings with any of the leaders——

A. No, not in the textile.

Q. Do you know of any reason why you couldn't be fair in this case, fair to both sides?

A. No reason why I can't be fair, no.

Q. And you think you could give your verdict solely and exclusively on the testimony as it develops in the case?

A. I think so.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Keiffer, have you served as a special juror before?

A. I have never served on the jury, but have been called.

Q. You have been called on the panel?

A. Panel.

Q. For a trial?

A. Yes.

Q. Have you done other jury service?

A. Well, I am a member of the Federal Grand Jury.

Q. When have you served last on the Federal Grand Jury?

A. About a year and a half ago.

Q. The fact that you are a member of the Grand Jury whose function it is to vote indictments, would that have any influence on you in the consideration of this case?

A. I don't think it would have any influence.

Q. Do you or do you not believe that there are probable grounds to believe that a person who has been indicted is guilty?

A. I feel that there is some grounds for it.

Q. And is that ground such that you couldn't lay it aside and give the defendants an entirely fair and impartial [fol. 258] trial?

A. I think I could give them a trial fairly.

Q. Do you feel that, having served as a Grand Juror and being familiar with the Grand Jury procedure, that there would be some doubt in your mind at the start that these defendants may be guilty of the crime charged?

A. I would feel that there was a little doubt in my mind.

Mr. Polakoff: I challenge him for cause.

Mr. Hogan: May I inquire, your Honor? You have made your challenge. I would like to inquire.

Mr. Polakoff: I am not through with my examination.

Mr. Hogan: Of course not.

By Mr. Hogan:

Q. Mr. Keiffer, you understand the rule that a defendant is presumed to be innocent until the testimony is concluded and until summations have been made and the charge has been given to you by the Court, do you not?

A. I am well aware of that, sir.

Q. And that that presumption continues with the defendant and inures to his benefit throughout the trial?

A. I quite understand that.

Q. And that being fundamental law, you appreciate that the Judge at the conclusion of the case will charge you to that effect?

A. Yes, sir.

Q. And you are prepared to faithfully follow the Judge's charge?

A. I am.

Q. There is no doubt that you can faithfully carry out your oath as a juror in that respect?

A. There is no doubt.

Q. And if you had any doubt as to the guilt of the de-
[fol. 259] fendants because they were indicted by a grand jury, you feel that you have the ability to lay aside that doubt?

A. I feel so, yes.

Q. And you could listen with an open and impartial mind?

A. Yes, sir.

Q. To the testimony in this case?

A. Yes, sir.

Q. And if you have a reasonable doubt after all that testimony is in, you wouldn't hesitate to acquit, is that right?

A. Right.

Q. Despite the fact that they have been indicted?

A. Oh, yes.

Q. You appreciate, do you not, that the indictment is simply a pleading in the case; you understand that?

A. I understand that.

Q. And that it is a charge that has no weight in this court room at all; you appreciate that?

A. I do.

Q. And you would be guided solely then by the testimony in the case?

A. Yes, sir.

Mr. Hogan: I object to the challenge.

By the Court:

Q. Well, I don't know, Mr. Keiffer, which position you are in now. You stated a few moments ago that you had some doubt in your mind about whether or not this defendant might be guilty. Have you that doubt at the present time? Do you think there is some proof that he has committed a crime just because he has been indicted?

A. I think the question asked me was that, whether I had any doubt in my mind at the time that I heard that they were indicted.

Q. What is the condition of your mind at the moment?
A. My mind is open.
Q. Open mind?
A. Yes.
Q. So you have no feeling whatever that there must be [fol. 260] some guilt here, or there wouldn't be an indictment?
A. I know of no such——
Q. No such feeling?
A. No such feeling.

The Court: Challenge overruled.
Mr. Polakoff: I respectfully except.

By Mr. Polakoff:

Q. Mr. Keiffer, as a member of the Grand Jury, do you feel that when you act as a Grand Juror, that there is good grounds for believing the man guilty just because an indictment had been filed? Do you?
A. I do feel that that——

Mr. Polakoff: I press my objection.
The Court: Excused. I will excuse the juror.

(Talesman excused.)

John F. Kachmar, residing at 446 East 66th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Kachmar, what is your occupation, sir?
A. I am a bank clerk.
Q. And what bank is it, sir?
A. The Bank of New York.
Q. How long have you been with the Bank of New York?
A. Sixteen years.
Q. And I guess that about covers your working days, does it not?
A. Yes.
Q. How old are you?
A. Thirty-three.
[fol. 261] Q. And what function do you fill in the bank?

A. I assist in the supervision of investments in fiduciary accounts.

Q. Do you have any accounts that stem from any of the companies whose names were mentioned here?

A. Well, one of the names that was read off yesterday, the New York Trap Rock seemed to ring a bell, but I am not sure whether the firm has done business with the corporation or for one of the families that at one time may have been interested in that corporation.

Q. But you didn't recognize the name of any individual?

A. No. There weren't any names read with that particular corporation. I listened for names, but I didn't hear any.

Q. In any event, your recollection which seems vague and uncertain——

A. Yes.

Q. (Continuing)—wouldn't interfere with your ability to serve as a juror in this case, would it?

A. No, sir.

Q. Have you read anything about the case that caused you to form an impression or opinion of any kind?

A. Not before Monday.

Q. And since Monday have you read anything that created an impression in your mind?

A. Oh, no. No impression. I just read the facts about the trial being postponed.

Q. Whatever you read, you recognized as hearsay, and which wouldn't have any place in the mind of any juror if he is chosen in this case; you appreciate that, do you not?

A. Yes.

Q. And you would give a verdict on the testimony and only the testimony as it comes from the witnesses in the case?

A. Yes, sir.

Q. You don't know the defendants?

A. No.

Q. And so far as you are aware, you don't know any friends of the defendants.

A. No.

[fol. 262] Q. And if you are convinced beyond a reasonable doubt, after all the testimony has been given in the case, that the defendants are guilty of the crime as charged

in the indictment, you wouldn't hesitate to convict them?

A. Yes, sir.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Kachmar, the individual names of those connected with the New York Trap Rock are Stirling Tomkins and William Foss.

A. I think the bank has done business with the Tomkins' family.

Q. Stirling Tomkins' family?

A. Yes.

Q. Would that have any influence on you whatsoever?

A. No, sir.

Q. In your judgment of this case?

A. No, sir.

Q. Have you served as a special juror before?

A. I have been called, but I have never served on the jury.

Q. Have you ever served as a juror in a criminal trial before?

A. No, sir.

Q. Have you served as a juror in a civil trial?

A. No, sir.

Q. I see. Did you hear the questions propounded by counsel, both for the People and the defendants, yesterday?

A. Yes.

Q. Just briefly, if the Court instructed you that an indictment was not to create any presumption whatsoever of the defendants' guilt, would you follow that instruction from the Court?

A. Yes, sir.

Q. If the Court should instruct you that the defendants are presumed to be innocent throughout the trial until the [fol. 263] People proved beyond a reasonable doubt that they are guilty, would you follow that instruction?

A. Yes, sir.

Q. And if there was a reasonable doubt in your mind, would you give the defendants the benefit of that doubt?

A. Yes, sir.

Q. Have you heard of this case previously to your being called?

A. No, sir.

Q. As a juror?

A. No.

Q. Nothing that you may have read would have any influence——

A. No, sir.

Q. (Continuing:) —Upon you. Do you know of any reason whatsoever that might affect your judgment as a fair and impartial juror in this case?

A. No, sir.

Q. Have you lived in New York City?

A. All my life, yes, sir, with the exception of a year or two I lived in Jackson Heights.

Q. You were not acquainted with any of the names that were read to you yesterday, with the possible exception of the Tomkins family; which is purely incidental to your position in the bank?

A. That is right.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The juror is acceptable to the People.

Mr. Polakoff: Satisfactory.

(The Talesman was accepted and sworn as Juror No. 3.)

[fol. 264] JULIUS M. SCHIFF, residing at 444 Central Park West, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Schiff, will you tell us your occupation, please?

A. I am the president of the Eastern Music Sales Company, and the Record Dealers Supplying, Incorporated, which are both distributing companies of phonograph records.

Q. How long have you been in that business?

A. I have been with them and with the parent company for two years.

Q. And prior to that?

A. I was in the shoe business.

Q. I notice you are a graduate of a law school.

A. I am. I practiced before the Ohio Bar for several years.

Q. Did you practice in New York at all?

A. No.

Q. How many years did you practice in Ohio?

A. Two years.

Q. And how long have you been in New York?

A. Since 1930.

Q. And what was your first occupation when you came to New York?

A. I was with the concern that I used to represent legally in the shoe business.

Q. And in what capacity in the shoe business again?

A. Manager of their Eastern Division.

Q. I see. And did they have stores and outlets?

A. Yes, sir.

Q. Did you supervise the work of those stores?

A. Supervised them and ran those stores completely.

Q. Did you have any dealings with labor union officials in that period?

A. I did.

[fol. 265] Q. And in your distribution of phonograph records, have you had some dealings also with them?

A. No, sir.

Q. You haven't become acquainted with Mr. Petrillo?

A. Well, as a distributor I wouldn't. The company that manufactures would.

Q. So that in your present connection which has existed for two years you haven't had any dealings with labor unions?

A. No, sir.

Q. Now, when you were with the shoe business, did your dealings result in any prejudice which still persists in your mind?

A. Well, we had a strike for two years, but that was a matter that happened then. It didn't result in any prejudice either way, and not enough, I believe, to make me unfair in judging either side.

Q. You think that despite what must have been an unpleasant experience at that time, you could and you have removed it from your mind, and you could sit as a juror in this case?

A. Yes.

Q. With perfect fairness to both sides?

A. That's right.

Q. Does anything occur to you that you think in any way limits the desirability of your serving as a juror in this case? Do you come with any reservation of any kind?

A. No. I don't come with any reservation.

Q. Well, now—

A. Except that I hope it don't last too long.

Q. I think you hope what is in everybody's mind, including the participants, when you voice that thought. Anything else now you think of?

A. No. I have been, I think I have been legally trained to reserve opinion, and to follow whatever the Judge instructs. I have had enough training to be fair and unbiased along those lines.

[fol. 266] Q. If the Judge charges in the case, you wouldn't pit your recollection of the law against his charge, would you?

A. No. I have sufficient training along those lines to realize what my duties are.

Q. And you could follow the charge of the Judge?

A. Yes, sir.

Q. Even if it disagreed with the Ohio law?

A. Correct.

Q. Because there probably are some differences, although fundamentally they are the same?

A. Definitely.

Q. You have no doubt as you sit there then that you could be fair and impartial in this case?

A. That is correct.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Schiff, have you ever sat as a juror before?

A. I have not.

Q. I believe you said the strike in which you or your firm was interested had left no impression either way upon you with reference to organized labor or its representatives, is that correct, sir?

A. No, it hadn't, because I was satisfied with the results.

Q. You are in the music business, are you not?

A. I am, sir.

Q. And that involves the sale of records?

A. Correct.

Q. There has been quite a controversy recently between Mr. Petrillo and the manufacturers of records?

A. I believe so. Yes.

Q. Which has, perhaps, resulted in a higher cost, or less profit to the manufacturer in the sale of records.

A. That is correct.

[fol. 267] Q. Has that affected your income in any way?

A. No. As a distributor, I make a certain percentage on them, and my percentage has not been affected. It has only affected the manufacturers.

Q. I am going to be very frank with you. Have you any prejudice against organized labor?

A. Should I answer that yes or no, or do you want me——

Q. No. Answer it yes or no first.

A. No. Not as organized labor.

Q. What sort of—in view of your qualification, may I ask, sir, what you had in mind?

A. Well, what I had in mind was, I think organized labor is a very fine thing, and I think it is a needed thing; it has been needed for many years, but I think that some of the people that run it are not the kind of people that should run organized labor. That is my frank expression.

Q. Would that opinion affect your judgment to the prejudice of the defendants in this case?

A. No. Then I would be condemning them as a whole, which I don't.

Q. In other words, especially due to your previous training, you feel that no matter what your personal feelings are, you could judge this case purely from the evidence and by the law as given to you by the Court?

A. I do.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The juror is satisfactory.

Mr. Polakoff: Satisfactory.

(The Talesman was accepted and sworn as Juror No. 4.)

[fol. 268] Leonard M. Johnson, residing at 330 East 43rd Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Johnson, you are in the banking business?

A. That is right, sir.

Q. The National City Bank?

A. The National City Bank.

Q. How long have you been with the National City Bank?

A. 22 years.

Q. And your capacity there is what?

A. Assistant vice-president.

Q. And what type of banking work are you in charge of?

A. I am in the foreign part of the bank. Most of my work has been in the Far East.

Q. I don't think we mentioned any companies that have any foreign interests.

A. Not that I know of.

Q. But you are the best judge of that.

A. No.

Q. Did you recognize any of the companies?

A. No, I did not.

Q. Did you recognize the names of any persons that we mentioned?

A. Only as names. I mean, Henry Kaiser, and names like that.

Q. You aren't a friend of any person——

A. No.

Q. —whose name was mentioned?

A. No.

Q. Have you any opinion or impression with respect to the guilt of these defendants, that you couldn't put aside?

A. No.

Q. Have you any opinion—I should have asked first, perhaps.

A. I have none.

Q. You haven't heard anything about the case that formed any opinion in your mind?

A. Only since Monday.

Q. Have you served as a juror before?

[fol. 269] A. I was called last October, but I wasn't selected as a juror at that time.

Q. You think you could be fair to both sides in this case?

A. I think so.

Q. And reserve your judgment until all the testimony is in the case?

A. Yes.

Q. Until you have had an opportunity to discuss the evidence with your fellow jurors?

A. Yes, sir.

Q. And then come to a decision solely and exclusively based on the evidence as it comes from the witnesses in the case?

A. Yes.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Johnson, how long have you been a special juror?

A. Well, I only came back to the United States in 1942, and I think it was sometime in 1943 that I got put on this special panel.

Q. Have you served between 1943 and the present time?

A. No, I have not.

Q. The first time you were in Court?

A. No, I was called in October but I didn't serve.

Q. I take it you were in other parts of the world on the business of the National City Bank?

A. That is right.

Q. Have you ever, while in the employ of the National City Bank, had anything to do with representing the bank in conferences or negotiations with labor unions or labor leaders?

A. We don't have anything like that in the Far East.

Q. You have been in the Far East for how long?

A. 20 years.

Q. So that you are really only back in town a couple of years?

A. That is right.

[fol. 270] Q. Three years. Have you ever served—withdrawn. Did you ever act as a complainant in a criminal case?

A. No.

Q. Did you ever serve as a grand juror?

A. No.

Q. In this county or any county?

A. No.

Q. Without asking you a lot of questions on the subject, suppose I say this to you: Do you have any views of labor, labor leaders, anything connected with labor, such as strikes, walk-outs, lock-outs, picket lines, that in any way formed an influence in your mind, that might help us, either Mr.

Hogan or myself, in determining whether to accept or reject you? I will leave it to your good sense.

Mr. Hogan: I object to the question as framed, your Honor. If Mr. Fitzsimmons wishes to ask whether there is any prejudice——

The Court: You mean prejudice, I suppose, don't you, Mr. Fitzsimmons?

Mr. Fitzsimmons: I do. I asked the question in the way I did to save time.

The Court: All right, I will let him answer.

A. Well, I naturally have definite views on labor and strikes and things like that, but nothing I have in my mind would influence me in my judgment in this particular case, if that is what you are asking.

Q. As the result of your views?

A. Yes.

Q. We all have views on various controversial subjects.

A. Surely.

Q. But as the result of the views you possess, have there in the past or are there now existing in your mind prejudices or influences that might work against giving the defendants a fair and impartial trial, if you were called to act as a juror in this case?

[fol. 271]

A. I would say no.

Q. Have you ever expressed an opinion—withdrawn. You said you didn't do any reading about this case.

A. Yes.

Q. Just a little bit prior to your coming down here to serve?

A. Yes.

Q. That is correct, isn't it?

A. That is correct.

Q. You haven't therefore, expressed any opinion to anyone about the case?

A. I didn't know anything about it until Monday.

Q. You haven't discussed it with anybody?

A. No.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: Satisfactory.

Mr. Fitzsimmons: Peremptorily challenged by the defense.

(Talesman excused.)

The Clerk of the Court: Jurors, kindly answer and step forward when your names are called.

Henry B. Humphrey, Jr.
Jacob J. Janzen.
Westmore Wilcox, Jr.
Arthur W. Hutchins.
Irwin Scharf.
Henry L. Goetz.

(The respective talesmen were then sworn collectively by the Court, and thereafter examined:)

[fol. 272] HENRY B. HUMPHREY, JR., residing at 246 East 46th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Humphrey, what is your business?
A. An advertising agent.
Q. You solicit accounts in any particular field?
A. No.
Q. Advertising for magazines or newspapers?
A. All kinds of advertising.
Q. How long have you been in that business?
A. About eight months.
Q. And the name of the firm?
A. The H. B. Humphrey Company.
Q. Is it your firm?
A. No. It is my father's firm.
Q. Associated with your father?
A. Yes.
Q. How many other persons are employed there?
A. Well, it is a Boston firm. I am the New York manager. I happen to be alone here in New York.
Q. And prior to eight months ago, what did you do?
A. I was an editor.
Q. With what company?
A. With Conde Nast; magazine editor.
Q. Which of their magazines?
A. House and Garden.
Q. And how long had you been with Conde Nast?

A. Eight years.

Q. And prior to that, if we may go back that far?

A. Eight years before that I was with Doubleday Doran as an editor of the American Home.

Q. So that your working experience has been in the editing field, and in the advertising field with respect to publications?

A. Yes.

[fol.273] Q. Do you know any of the persons whose names were read out yesterday?

A. No.

Q. Have you had dealings with any of the companies?

A. No.

Q. Could you be a fair and impartial juror in this case?

A. Yes.

Q. And give your verdict after all the testimony is in, without prejudice or sympathy, based on the testimony from the witnesses in the case?

A. Yes.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Did you ever write any articles about labor in any of these magazines you are connected with?

A. No.

Q. Or about labor leaders?

A. No.

Q. Or about anything connected with labor, such as strikes, picket lines, walk-outs?

A. No.

Q. What magazine did you say you are the editor of at the present time?

A. I am an advertising agent now.

Q. Oh, an advertising agent. You mentioned the firm?

A. Yes.

Q. It is your father's firm and you are the New York manager?

A. Yes.

Q. Have you ever served as a special juror prior to your call at this Term of the Court?

A. No.

Q. Have you ever been a grand juror in this county or any other county?

A. No.

Q. Have you served as a general juror in some of our other courts?

A. Never.

Q. This is the first time you have been called?

A. Yes.

[fol. 274] Q. Have you ever acted as a complainant in any criminal case?

A. No!

Q. For the purpose of conserving time, you no doubt have views on subjects like labor, labor leaders, walk-outs, picket lines—things of that type. As a result of those views, which you possess, have they created in your mind an influence that might in any way be prejudicial to these defendants? I am leaving that to you to suggest to me. If there is anything that you have in mind, tell us. We are here to seek an impartial juror. I don't want to waste time, I don't want to put a lot of questions to you. If you think of anything in your mind, tell me what it is that might influence your judgment one way or the other.

A. No, I can't.

Q. You say you don't know any of these firms whose names have been mentioned here?

A. No, I don't.

Q. As advertising manager of this company that you are with, what type of advertising do you solicit?

A. All sorts.

Q. Have you solicited and received advertising from contractors at any time?

A. Never.

Q. Do you solicit them?

A. Not that I know of, no. But we might.

Q. Did you ever hear of this Delaware Water Project?

A. Yes, I have.

Q. Did you ever carry any advertising in connection with that project, either for the City of New York who sponsored it, or any of the contractors who were involved?

A. None at all.

Q. Were you born in New York, sir?

A. No.

Q. Where?

A. Hyde Park, Massachusetts.

Q. Hyde Park, Massachusetts?

A. Yes.

Q. Not a neighbor of our President?
A. No, not Hyde Park, New York.
[fol. 275] Q. How long have you lived in New York?
A. Off and on about twenty years.

Mr. Fitzsimmons: No challenge for cause.
Mr. Hogan: The juror is satisfactory to the People.
Mr. Fitzsimmons: Peremptorily challenged by the defense.

(Talesman excused.)

JACOB J. JANZEN, residing at 400 East 49th Street, New York City, a talesman, having been previously sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Janzen, what is your occupation, sir?
A. I am with the Ingersoll Rand Company. I am manager of the oil and gas engines department.
Q. And how long have you been with that company?
A. Nineteen years.
Q. You know Mr. Champion, then, I guess?
A. Yes, I do.
Q. And have you had dealings with any of the companies, the names of which were mentioned yesterday?
A. Not myself. Our company has.
Q. And do you know any of the persons whose names have been mentioned?
A. No, I don't.
Q. Will you tell us what your work is with the Ingersoll Rand Company?
A. Well, I am the manager of the oil and gas engines department, and as such we do the engineering work, and [fol. 276] sales promotion work, or sales work; primarily with the petroleum industry.
Q. And is your work outside the office for the most part?
A. No. It's in the office for the most part; some traveling over the country, though.
Q. And when you travel, you go to the various oil fields?
A. To the various branches of the company. The company has branches throughout the territory.
Q. Now, this is foreign to my experience and you will pardon my repeating these questions?

A. Yes.

Q. When you are in the field, just what is the actual dealings you have with these people?

A. Selling.

Q. Equipment and machinery of all kinds?

A. That is right.

Q. And you manufacture——

A. Yes, we manufacture——

Q. The machinery too?

A. Yes.

Q. Where are the plants of the Ingersoll Rand Company?

A. We have several plants; one is at Phillipsburg, New Jersey, one in Easton, Pennsylvania, one at Painted Post, New York; another one in Athens, Pennsylavnia. Those are the plants in this country.

Q. Yes. And you have nothing to do with the negotiation of labor contracts?

A. Nothing at all.

Q. That is foreign to your department entirely?

A. That is right.

Q. Do you know of any reason why you couldn't sit in this case, if selected by both sides, and give a fair and impartial verdict?

A. No, I don't.

Q. How long have you lived in New York City?

A. Thirteen years now.

[fol. 277] Q. And prior to that?

A. About two years before that.

Q. Where was that, sir?

A. In New York. But I mean, thirteen years on a stretch now, and then I was abroad for the company, in South America, and lived here two years before that.

Q. Have you ever served as a juror before?

A. No, sir.

Q. Not in civil cases, either?

A. No.

Q. You heard the questions asked by myself and by Mr. Fitzsimmons and Mr. Polakoff. Did any questions asked of any previous juror suggest an answer, from your own experience, that might be helpful to us in determining whether or not to challenge or accept you in this case?

A. No. It didn't.

Q. There isn't anything that occurred to you, that might make it difficult for you or embarrassing for you to sit in this case?

A. Nothing at all.

Q. And do you believe that if the testimony in this case convinces you that the defendants were guilty of the crimes charged in the indictment, beyond a reasonable doubt, that you could convict them of the crimes charged?

A. Yes.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Were you ever a witness in a criminal case against anyone?

A. Never.

Q. Did you ever serve as a grand juror in this county?

A. Never.

Q. Or any other county?

A. No juror.

Q. And did you hear that general question that I put to [fol. 278] Mr. Humphrey who was on the stand before you, concerning his views, and as the result of his views I asked whether or not he had any prejudice towards labor or labor unions?

A. Right.

Q. Or anything connected with labor. Now, assume that I put the same question to you. Have you any prejudices in your mind against labor leaders or labor unions or strikes, lock-outs, walk-outs, picket lines, and so on?

A. No, I don't. I might have prejudices against certain strikes or the type of strikes, but not in general against labor and labor unions.

Q. In other words, if you have had an experience where you felt a strike was unjust, that you know of and that possibly you suffered some inconvenience by it, you wouldn't use that prejudice against some other labor leader who had nothing to do with that strike?

A. No, I wouldn't

Q. Or nothing to do with the union that caused the strike?

A. That is right.

Q. Assuming that you were drawn as a juror in this case, would you accept all the law from his Honor and apply that law to the case as his Honor tells you to?

A. I would.

Q. And would you accept nothing but the facts from the mouths of the witnesses as they testified to them here in court?

A. I would.

Q. And if after hearing the entire case, the facts from the witnesses, and getting the law from the Judge, if you then had a reasonable doubt in your mind as to the guilt or innocence of the defendants, either from the evidence or the lack of it, would you hesitate to vote for their acquittal.

A. Would you mind repeating it?

Q. If there was a reasonable doubt in your mind about [fol. 279] their guilt, would you vote for acquittal?

A. Yes.

Q. You don't hesitate on that answer at all?

A. No. I just didn't get the question.

Mr. Fitzsimmons: That is all right. No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: Satisfactory to the defense.

(The Talesman was accepted and sworn as Juror No. 5.)

(A short recess was taken.)

Westmore Willcox, Jr., a talesman, residing at 146 East End Avenue, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Willcox, did you recognize in the names that were called out any friends of yours.

A. No.

Q. Have you had dealings with any of the companies that have been mentioned in connection with the case?

A. No.

Q. What is your occupation, Mr. Willcox?

A. Financial consulfant.

Q. And is that a business of your own, or are you associated——

A. It is my own.

Q. How long have you been in that business, sir?

A. About a year.

Q. And prior to that what did you do?

A. I was in Washington, in war work.

[fol. 280] Q. And that extended back for a few years?

A. Two years.

Q. And before that, sir?

A. Investment banker.

Q. With what firm?

A. Jackson, Curtis; Dillon, Read, Blythe & Company.

Q. Dillon-Read is familiar. Is Jackson & Curtis a New York firm, too?

A. It is a Boston firm primarily, with a New York branch.

Q. Where were you born, sir?

A. Virginia.

Q. And then to Boston and then to New York, is that it, by way of Washington?

A. Well, I have lived in all of them. I lived here since 1928.

Q. And in any of your work have you come in contact with labor union officials?

A. No.

Q. Have you served as a juror before?

A. Yes.

Q. And you know that—you know the rules that guide us in these courts?

A. Yes.

Q. Do you think that you could be fair and impartial in this case?

A. Yes.

Q. Could you give a verdict, without permitting sympathy or prejudice to influence you in any way?

A. Yes.

Q. Have you read anything about the case at all?

A. Only glancing at the headlines in the paper in the last few days.

Q. And nothing before the last few days?

A. Nothing before that.

Q. Did you meet any labor union officials in connection with your work in Washington?

A. No.

Q. What type of work was that, Mr. Willcox?

A. I was a director of the British Raw Materials Mission, and in the State Department.

Q. And after listening to all the testimony in the case, discussing it with your fellow jurors, if you are acceptable

[fol. 281] to both sides, you believe that you could convict if the testimony convinced you that the defendants were guilty beyond a reasonable doubt?

A. Yes.

Q. And if you had a reasonable doubt, of course, you would unhesitatingly acquit?

A. Yes.

Q. Be fair to both sides?

A. Yes.

Mr. Hogan: Thank you, sir. No challenge for cause.

By Mr. Fitzsimmons:

Q. You heard, Mr. Willcox, the general question I asked, concerning the possibility of prejudice existing in your mind as a result of certain views that you might or might not possess. Without asking 10 or 12 questions, to arrive at that point, you too have certain views, and as a result of those views do you have a prejudice in any way against a labor union representative, labor unions, or anything connected with labor, such as a strike or a walk-out or a picket line?

A. No proper one.

Q. I beg your pardon?

A. No proper one.

Q. No proper one? What do you mean by that?

A. Well, I mean I have no prejudice against labor unions or leaders or collective bargaining, so long as it is the right kind, proper kind.

Q. Is that what you mean by——

A. I would naturally be prejudiced against labor unions who I felt were of the improper kind.

Q. What is your standard by which you fix the proper or the improper?

A. The standard here would be the evidence as to the indictment.

[fol. 282] Q. Have you ever served as a special juror prior to your service here?

A. Yes.

Q. On how many occasions?

A. Twice.

Q. When did you serve last?

A. I should think several—five or six years ago, six or seven years ago, maybe.

Q. A murder case, was it?

A. Murder case, one of them.

Q. Prior to that time?

A. Nothing prior to that.

Q. You are acquainted with the general rules of law that apply in a criminal case?

A. Yes.

Q. Such as the meaning of an indictment: that in and of itself has no probative value?

A. Yes.

Q. It is merely the means of bringing one before the Bar of justice. Suppose there were an indictment rendered by a grand jury in this county against these two defendants; would you have any feeling in your mind that they might not be the proper leaders?

A. No.

Q. That you spoke about a few moments ago?

A. No.

Q. In other words, you are sufficiently acquainted with the meaning of an indictment and the law applicable thereto, that you would not start with any prejudice along that line?

A. That is right.

Q. If chosen in this case then, you too would take the law from his Honor, and you would give a fair and impartial verdict?

A. Right.

Q. There is no experience that has existed in your life, that might in any way form a prejudice or any other feeling, that might take away from these men the right to get a fair and impartial trial at your hands?

A. No.

[fol. 283] Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: Peremptorily excused by the defense.

(Talesman excused.)

Arthur W. Hutchins, a talesman, residing at 277 Park Avenue, Manhattan, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Hutchins, you are associated with the Irving Trust Company?

A. I am.

Q. How long have you been connected with them?

A. Well, with it and its predecessors 39 years.

Q. What was the predecessor, American——

A. Columbia Trust Company immediately before. The Knickerbocker Trust before that.

Q. And are you trust officer there?

A. I am not.

Q. In what capacity do you serve?

A. Well, I am a vice-president; I have charge of the investment of all funds which are not loaned to customers of the bank. In other words, I purchase and sell all Government bonds, other securities, brokers' loans, mortgages, and some other classifications.

Q. Have you at any time had dealings with any officials of the firms that were mentioned yesterday?

A. Well, we know the Utah Construction Company; also New York Trap Rock.

[fol. 284] Q. Do you know any of the officials of those companies?

A. I do.

Q. And which of the officials?

A. The Chairman of the Board of the Utah Construction Company.

Q. What is his name?

A. Mr. Mariner Eccles.

Q. He will not be a witness in this case, at least in so far as the People are concerned. Are your relations with these firms such that you could not act as an impartial juror in this case?

A. No; I see no reason why I shouldn't.

Q. And do you know of any reason why you could not be fair to both sides in this case?

A. No.

Q. You have served as a juror before?

A. I have.

Q. You appreciate that the jurors are the sole judges of the facts, and that the jurors accept the law from his Honor?

A. I do.

Q. And that neither sympathy nor prejudice should influence your decision with respect to the testimony in the case?

A. I do.

Q. And you are prepared, if agreed upon by both sides, to listen carefully to that testimony, to reserve your decision

until after the jury has retired and has been directed by the Court that it is time to discuss the evidence in the case?

A. Yes, sir.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Hutchins, you have served as a grand juror in this county, have you not?

A. I have, in the Federal Court.

[fol. 285] Q. Oh, in Federal Court?

A. Yes, sir.

Q. At a time when your name was on the special panel here in this county?

A. That is correct.

Q. All of which is proper and right, being two different jurisdictions. You are a trust officer or vice-president of the Irving Bank?

A. Vice-president—not trust officer.

Q. Vice-president?

A. Yes.

Q. Who is the gentleman that you named, of the Utah Construction Company?

A. Mr. Mariner Eccles is Chairman of the Board of that company, and that company is one of our depositors.

Q. How do you spell his last name?

A. Eccles, E-c-c-l-e-s. He is the head of the Federal Reserve Bank.

Q. Do you know him personally?

A. I have met him a couple of times at lunch and a couple of times otherwise at dinner.

Q. And what position does he occupy with the Utah Construction Company?

A. Chairman of the Board—at least, he was, the last I knew.

Q. He was Chairman of the Board, no doubt, at the time when the Utah had a contract for the building of a part of the Delaware Aqueduct Supply System?

A. I can't say, Mr. Fitzsimmons; I don't know. I think that he was, but—I think, perhaps, as a matter of fact, that is how we got the business, but I am not sure.

Q. Did you ever discuss with him anything concerning the building of the Delaware Water Supply Tunnel?

A. I have not, personally.

Q. You have no doubt, on the occasions when you met him, discussed some things with him, of course. You have talked to him?

A. Oh, yes.

[fol. 286] Q. Might it not be embarrassing, if you were chosen as a juror in this case, to sit and pass on testimony that concerned the Utah Construction Company, of which your friend was—or, at least an acquaintance, was the Chairman of the Board?

A. Well, that is a hard question to answer, without knowing the evidence. It conceivably might be. Perhaps it would not be.

Q. Of course, I am not permitted at this time to say what the evidence might or might not be.

A. I know.

Q. But there will be some evidence concerning the part the Utah played in this case, so that may I ask you now if you feel, in all fairness to the defendants and to yourself as a juror—don't you feel that something might happen that would make it embarrassing?

A. Well, as I said, it is quite possible that it might, yes, sir.

Q. You would not want to be embarrassed, any more than we might want to be.

A. Oh, I would not want to be embarrassed.

Q. I mean, it would be a person[redacted]matter for yourself. If you were sitting in the box, you would not know what the cause——

Mr. Fitzsimmons: May I respectfully challenge for cause here?

Mr. Hogan: That is making out a challenge, your Honor. The juror said he is prepared to carry out his oath as a juror, whether it is embarrassing or not.

Mr. Fitzsimmons: It is the same proposition, I think, we had earlier this morning. He said he might and he might not be.

Mr. Hogan: The question is with respect to whether he [fol. 287] had an attitude as to the ——

The Court: I do not think it is a ground for challenge, but the Court will excuse him, anyway.

(Talesman excused by the Court.)

IRWIN SCHARF, a talesman, residing at 75 Park Terrace, East, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Scharf, what is your business, please?

A. In the sewing machine rental. We have a patent on a certain sewing machine, which we rent out on a royalty basis to the umbrella industry.

Q. To the umbrella industry?

A. Yes, sir.

Q. And how long have you been in that?

A. Seventeen years.

Q. Prior to that what was your occupation?

A. I came to this country at that time. I was 20 years of age.

Q. Where were you born?

A. In Vienna.

Q. And naturalized?

A. Yes, sir.

Q. When?

A. I came here before I was 21 years of age, and being my father was a citizen, then I became a citizen.

Q. Through your father's papers?

A. Yes, sir.

Q. So that your sole occupation has been with this company?

A. Yes, sir.

Q. Is it your own company?

A. I am a partner with my father in that company. My father is retired now.

[fol. 288] Q. Is this a line—a line of business that your father was in, in Vienna?

A. No. My father was here many years before I came over. I had my schooling abroad, and when I came back here, why, he took sick, and I took over.

Q. Do you know any of the persons whose names were mentioned in this case?

A. No, sir.

Q. Have you had any dealings with any of the firms?

A. No, sir.

Q. And do you solicit business for the use of this sewing machine?

A. Why, it happens that our machine is very important to the industry, and about three years after the invention the whole industry took it, so we don't have to solicit any more.

Q. A little monopoly, is that it?

A. Yes, sir.

Q. So they come to you?

A. Yes.

Q. Have you served as a juror before?

A. I was called, but I never served. I was called various times.

Q. Have you read anything about this case?

A. Why, just on Monday.

Q. Prior to Monday you had read nothing?

A. No, sir.

Q. It did not leave any opinion in your mind with respect to the guilt of the defendants?

A. No, none whatsoever. There wasn't enough information.

Q. Do you think you could be fair to both sides in this case?

A. Oh, yes.

Q. And give a verdict strictly on the evidence as it is addressed from the witnesses who are called to the stand in the case?

A. Yes, sir.

Mr. Hogan: No challenge for cause.

[fol. 289] By Polakoff:

Q. Mr. Scharf, have you had any contact directly or indirectly with organized labor?

A. No, sir.

Q. Have you any fixed opinion about organized labor or its representatives, which would cause you to be prejudiced against the defendants in this trial?

A. None whatsoever.

Q. You are prepared to take the testimony from the witness and the law from the Court, and follow them both carefully, and give whatever benefit the law allows the defendants to them?

A. Yes, sir.

Q. Do you know of any reason whatsoever that would prevent you from giving both sides a fair and impartial trial?

A. None whatsoever.

Q. There is nothing you have heard about the case that would have any influence upon you whatsoever?

A. No, sir.

Q. Have you served as a juror in a criminal case before?

A. I have never served. I was called a few times.

Q. Have you ever served in a civil case?

A. No, sir.

Q. Have you ever been a member of any Grand Jury?

A. No, sir.

Mr. Polakoff: No challenge.

Mr. Hogan: The People will excuse Mr. Scharf.

(Talesman excused.)

[fol. 290] Henry L. Goetz, a talesman, residing at 1150 Park Avenue, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Goetz, do you know any of the persons whose names were mentioned here yesterday?

A. I do not.

Q. Have you had dealings with any of the firms, or do you know any of the officials of any of the firms?

A. No, sir.

Q. What is your business, Mr. Goetz?

A. I am a wholesaler in jewelry novelties.

Q. Selling to retail jewelry stores?

A. That is right.

Q. What type of jewelry is it?

A. Mostly silver jewelry.

Q. I beg your pardon?

A. Silver.

Q. Silver?

A. Yes.

Q. Rings and bracelets and that——

A. Yes.

Q. And how long have you been in that business?

A. Well, that business is an out-spring of an importing business that I was in for a good many years. I could not import any more and I had to get into something else.

Q. I see. So was it importation until 1939, till the war started?

A. That is right.

Q. And where did you import from?

A. From the Far East.

Q. Silver, for the most part?

A. No, no, novelties and——

Q. Novelties at that time?

A. Yes.

Q. And then.

A. Curios and that type of merchandise.

Q. And the last few years a wholesale dealer in silverware—that is, in silver jewelry.

A. And curios. That is in my line.

Q. And how long had you been in the business of import- [fol. 291] ing curios and other merchandise from the Orient?

A. Oh, I would say about 18 years.

Q. And in that—well, rather, in the latter connection, the wholesale connection, you do no manufacturing of any kind?

A. Oh, no.

Q. You do not have dealings with labor union officials?

A. None at all.

Q. Have you read anything about this case, Mr. Goetz?

A. Yes; I remember reading about it at the time of the indictment.

Q. That is, in 1943?

A. That is right.

Q. Did it leave any opinion which you could not easily lay aside as a prospective juror?

A. No. I just read the details—I mean, I just remember it hazily.

Q. You have not, as you sit there, any impression with respect to the guilt or innocence of these defendants?

A. No, I have not.

Q. You have a perfectly clear mind in that respect?

A. Yes.

Q. And if you were selected as a juror in this case, you could be fair to both sides?

A. I am not so sure.

Q. Well, please tell us about that then.

A. Well, prior to the other business, to my importing business, I was in a manufacturing business.

Q. This is 23 years ago?

By the Court:

Q. You had some labor trouble?

A. And we had labor trouble. Eventually I got out of that business, and I feel I am a little biased.

The Court: He is excused.

(Talesman excused by the Court.)

The Clerk: Jurors, kindly answer and step forward as [fol. 292] their names are called. Newbury F. Read, Robert A. Brooks, William J. Brett, Paul Adelsberger, Ruth F. Bien, Malcolm Oakes.

(The above named talesmen were then sworn collectively by the Court, and thereafter examined.)

Newbury F. Read, a talesman, residing at 37 West 52nd Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Read, what is your occupation?

A. Real estate, sir.

Q. In your own business?

A. George R. Read & Company.

Q. And that Read is spelled the same as your name?

A. Yes.

Q. It is a family business?

A. Family business.

Q. How long have you been in that business?

A. Thirty years.

Q. And dealing in real estate in what part of the city?

A. Practically all over it. I am managing properties.

Q. Your office is where?

A. 30 Nassau Street.

Q. And is it the management of properties, to a large extent?

A. Yes, and brokerage.

Q. Do you own any property also?

A. No.

Q. In connection with the management of property, do you come in contact with labor union officials?

A. Yes, frequently.

Q. Do you personally handle that phase of the work?

A. I do, in the buildings that I manage.

[fol. 293] Q. And have you had any disagreements, any difficulties with these labor officials, that has left any prejudice in your mind with respect to them?

A. I think not. No.

Q. That is, you could be fair to the defendants in this case and regard the fact that they are labor union officials as an incident?

A. I think so, sir, yes.

Q. And that the rights—the contention of the People, at least, is that the rights of labor are not in any way involved in the case; you appreciate that?

A. Perfectly.

By the Court:

Q. Are you sure about that, Mr. Read? You say you think so. Do you mean that you——

A. Well, it is a little difficult, sir, to be honest about one's prejudices.

Q. Well, have you got prejudices which might influence you in this case?

A. I have had some unpleasant difficulties.

Q. Yes. So you feel they might influence you?

A. I think they might, sir.

(Talesman excused by the Court.)

Robert A. Brooks, a talesman, residing at 115 West 104th Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Brooks, will you tell us your occupation, please?

A. Traveling salesman for the Abington Press.

[fol. 294] Q. And the Abington Press publishes books or——

A. Yes.

Q. Books. How long have you served in that capacity?

A. Since 1920.

Q. Do you travel all over the country?

A. Yes, as far west as the Pacific.

Q. And your customers are book stores and schools, perhaps?

A. No; it has been the colleges and conventions of college men, who are wanting to accept certain lines of books for their uses.

Q. You deal in University text books, to a large extent?

A. That and books along certain lines of religious work.

Q. What did you do before you made your connection with the Abington Press, sir?

A. I was a book salesman over the West before they accepted me.

Q. I take it that you haven't had any contact with labor union officials, which would influence you one way or the other?

A. No, I have not.

Q. You have served as a juror before?

A. I have not.

Q. Do you think that you could be impartial, if selected as a juror in this case?

A. I really think so.

Q. Well, have you any doubt with respect to that?

A. None whatever.

Q. If your took your oath, you would honestly live up to it and give a fair hearing to both sides?

A. Yes.

Q. And if you were convinced beyond a reasonable doubt that the defendants were guilty of the crimes charged in the indictment, you would unhesitatingly convict?

A. Yes.

Q. If you had a reasonable doubt, of course, you would acquit?

A. Yes.

[fol. 295] Q. That is in accordance with the law as his Honor will charge it to you; and you would have no difficulty obeying his Honor's charge in that respect, would you?

A. I think not. I am certain——

Q. Have you any reservation in your mind now, that in fairness to both sides you think we ought to explore further?

A. No.

Mr. Hogan: Thank you, sir. No challenge for cause.

By Mr. Polakoff:

Q. Mr. Brooks, would you tell us somewhat about the type of books that you sell to colleges and institutions?

A. With pleasure. Webster's Dictionary, certain encyclopedia that the house would buy and let me sell, certain histories, and certain history of certain religious lines of approach.

Q. Without naming it, would the religious lines of approach be referred to one particular religion or to religions in general?

A. You accept my apologies—I have a bit of a cold, and I didn't get all that question.

Mr. Polakoff: Please read it.

(The question was repeated by the stenographer.)

A. To religions, in general.

Q. You have served as a juror on a special panel before; is that correct, sir?

A. Yes.

Q. On a number of occasions? On a number of occasions?

A. Three or four times.

Q. Without naming the trials, would you tell me whether [fol. 296] they were all murder cases or not?

A. No, they were all civil court.

Q. All civil cases?

A. Yes, all civil cases.

Q. And you served as a special juror in civil cases, or as a general juror, sir?

A. W ll, I guess I will have to correct that and say just as a general juror.

Q. I see.

A. Yes.

Q. Is this the first time you have been called on a special jury?

A. Yes.

Q. Wherefore; your statement is that you have never served before in a criminal case; is that correct, sir?

A. That is correct.

Q. Mr. Brooks, I may be in error——

Mr. Hogan: Would you excuse me just a moment, till we go to the bench?

(The Court conferred with Mr. Hogan, Mr. Fitzsimmons, and Mr. Polakoff.)

The Court: This juror is excused by the Court.

(Talesman excused by the Court.)

William J. Brett, a talesman (residing at 230 East 73rd Street, Manhattan, New York), was then examined on the voir dire as follows:

Examination by Mr. Hogan:

Q. Mr. Brett, do you know anybody whose name figured in the discussions we have had so far?

A. No, I do not.

Q. Have you had dealings with any of the companies?

A. No, sir.

Q. What is your business?

A. I have been in the automobile business, as salesman [fol. 297] and sales-manager, from 1929 till 1942; and then I was in the oil-burner business—that is, associated with a friend of mine, not as part owner, but working with him, with the idea in mind of becoming interested in the business; and that lasted until 1942, I think—early 1943.

And then I invested some money in a company that was formed to purchase a war plant. The deal was not consummated, and the company never functioned; and at the present time I am not connected.

Q. You brought me up to 1943, and then you told me about negotiations for a war plant.

A. Well, that company, as I say, never functioned, but they carried on, with the idea of functioning, up to—well, up to pretty near the present time.

Q. Yes.

A. And now I am just trying to salvage some of my investment.

Q. I see. Was the oil burner—I think you said it was——

A. Yes, sir.

Q. Was that a sales agency that you were interested in?

A. Well, sales and installation, both.

Q. You were looking forward to a part ownership in that?

A. That is right, sir.

Q. And where was your automobile agency?

A. Well, several different agencies in New York City. The last one was at 247 Park Avenue. Of course, most of them have since gone out of business, due to war conditions.

Q. Yes, but you have been in that, I think you told me since 1929?

A. That is right, sir.

Q. Did you have dealings with any labor union officials, in that connection?

A. None whatever.

Q. Have you friends who are labor union officials?

A. No, I have not.

[fol. 298] Q. Have you read anything about this case, that would form any opinion in your mind?

A. Well, a little of what has been in the papers recently, and probably when the indictment was brought out; but I have no recollection of it and couldn't connect the names on the jury notice with anything that I had read.

Q. Then I take it you have no opinion with respect to the innocence or guilt——

A. None whatever.

Q. Have you served as a juror before?

A. Yes, in—as a special juror, in General Sessions, and also in Federal juries.

Q. You are familiar with the rules?

A. Yes, I am.

Q. You have no difficulty in observing the charge given by the Court in criminal cases?

A. No, I have not.

Q. And if selected as a juror, you would be fair to both sides?

A. I am sure I would.

Q. Reserving your decision until all the testimony has been brought forward?

A. I would.

Q. And the case is finished?
A. I would, sir.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Did any company with which you were connected have labor difficulties?
A. No.
Q. Have you any fixed opinion either way that would cause you to favor either side in this case?
A. No; I have absolutely an open mind.
Q. You have no prejudices against labor unions nor its executives as such?
A. I have none whatever, no.
Q. You have not discussed this case or read this case in any way that might affect your judgment?
[fol. 299] A. No; I have read a little of it, what has been in the papers recently, but nothing in there affected my judgment one way or the other.
Q. You have served before as a special juror; is that correct?
A. Yes.
Q. On three occasions?
A. I believe it was three—three different murder trials, I think.
Q. Three different murder trials?
A. And then there was two—I believe two criminal trials in the Federal Court.
Q. How long ago have you served in the Federal Court?
A. Just exactly two years ago the 2nd of March.
Q. That is the last time you served?
A. Yes.
Q. You are familiar with the rules of evidence in criminal cases?
A. Yes, I am.
Q. Where did you say you live, sir?
A. At 230 East 73rd Street.
Q. You have lived there for a considerable time?
A. It is going on the 5th year.
Q. And what business are you in now?
A. Well, really, none. I am just trying to clear up what is left of the business that we started to organize and in which I invested.

Q. Was that a war business?

A. No; it was formed to purchase a defunct war plant, but the deal was never consummated, and the business really never functioned.

Q. Well, how long ago did that take place?

A. About a year ago, it started.

Q. That is prior—and prior to that you were doing what?

A. I was with—in the oil burner business.

Q. Automobile business?

A. Oil burner.

Q. Oh, oil burner?

A. Yes.

[fol. 300] Q. How long ago was that last?

A. Oh, about a little over a year, I think.

Q. And did I understand you to say you were connected with some automobile sales company?

A. Yes, with several dealers throughout New York City.

Q. And was there a time when there was labor difficulty among the automobile dealers in New York City?

A. There was never any general—there are a few isolated dealers that had a little difficulty; I believe their salesmen formed an organization, but ours never connected with it, or any firm that I was ever connected with ever had any trouble.

Q. And you have no prejudices against salesmen forming a union?

A. Oh, not at all.

Q. It just so happened that the firm that you were with never had that——

A. That is right. I believe it only happened in probably a half a dozen dealers throughout the city. That is my recollection.

Q. That did not cause you to form an opinion?

A. No, it didn't.

Q. As to the labor organizations?

A. No.

Q. You have no prejudices whatsoever, that you could not lay aside if you had them?

A. No, I haven't any prejudices.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: He is excused.

(Talesman excused.)

[fol. 301] PAUL ADELSBERGER, a talesman (residing at 24 Fifth Avenue, Manhattan, New York), was then examined on the voir dire as follows:

Examination by Mr. Hogan:

Q. Mr. Adelsberger, how long have you lived in New York City?

A. Since 1914, with the exception of nine years when I was in Europe, from 1922 to 1933—from 1923 to 1933, ten years. And then again back here from 1933 to 1945.

Q. And what is your present occupation?

A. I am personnel manager, Stewart's Cafeterias.

Q. How long were you with Stewart's?

A. Eleven years.

Q. Pretty much since 1933, since you came back?

A. That is right.

Q. And how long have you been personnel manager?

A. Three years.

Q. In that capacity—if the word means what I think it does—you hire the help for the cafeteria?

A. That is right.

Q. And you deal with labor union officials in that connection?

A. I do.

Q. What union officials do you deal with?

A. Local 302, A. F. of L., Local 1——

Q. Those are waiters' unions?

A. Local 1 of Waiters' union Local 1 of cashiers' union, and C. I. O. union, Local 89, which is also a cafeteria—a restaurant union.

Q. Your work is almost exclusively with union officials, then, is it not?

A. Well, I sat in on the negotiations.

Q. I beg your pardon?

A. I had sat in, in negotiating the contracts with members of the firm.

Q. Well, would——

A. And the union.

Q. Would you have in mind, if you were selected as a [fol. 302] juror in this case, your future relations with labor union officials, in passing upon the guilt or innocence of these labor union officials?

A. I would not. I would not have it in mind.

Q. It would not be difficult for you to sit in judgment on these men?

A. No.

Q. Have you read about this case at all?

A. I read, the last few days; and I recall now that I read about it in the Times two years ago.

Q. And you formed no opinion?

A. I formed no opinion.

Q. And do you have any prejudice against labor union officials?

A. No. I have been a member of a union myself, prior to becoming a personnel manager.

Q. You had no disagreement which would leave any opinion of any kind?

A. No, none whatsoever.

Q. Have you served on a jury before?

A. I have.

Q. What did you do before you returned to Europe? I think you told me you were nine years——

A. I was in Wall Street from 1914 to 1923. I returned to Europe to take over a manufacturing plant.

Q. I see.

A. And I stayed there as an American citizen till 1933.

Q. Do you think you could be fair and impartial to both sides in this case?

A. I believe so.

Q. And render your verdict, without permitting sympathy or prejudice to influence you in any way?

A. Yes.

Mr. Hogan: No challenge for cause.

[fol. 303] By Mr. Pokaloff:

Q. Mr. Adelsberger, the case that you had sat in before as a special juror was a murder case?

A. It was a murder case.

Q. Now, you have had considerable dealings with the various unions in the restaurant industry, have you not?

A. That is right.

Q. And there has been a great deal of difficulty between restaurants and unions, in the last three or four years, has there not?

A. I don't think so.

Q. Well, haven't there been insistent demands for higher wages?

A. There has been bargaining, and there have been new contracts drawn; but I was only sitting in, I was not a party to the bargaining.

Q. Have there been times in the last few years when demands were made for increased wages, though contracts were in existence?

A. No.

Q. Are you sure about that, in the restaurant industry?

A. Many might have asked, but there were no particular threats that I know of.

Q. Have there been threats of strikes in the last few years?

A. Not that I know of.

Q. Do you feel, in spite of your dealings with the labor organizers, that you have no prejudice whatsoever against labor unions or its organizers or executives?

A. I have no prejudice.

Q. In spite of your dealings with them?

A. I have been a member of a union.

Q. But you are not a member of a union now?

A. I was honorably discharged at the time I became personnel manager.

Q. Therefore, you feel that you could give both sides a fair trial?

A. I believe so.

Q. Do you know of any reason, that we may not have [fol. 304] inquired about, which would prevent you from giving either side a fair and impartial trial?

A. I know no reason.

Q. You have been in the restaurant business for a good number of years?

A. I have been with Stewart's eleven years.

Q. And prior to that, sir, what was your business?

A. It was manufacturing toys in Germany. And prior to that I was in Wall Street, foreign exchange manager and cashier.

Q. In any of those places had you any experiences which might cause you to be prejudiced against organized labor?

A. None whatsoever.

Mr. Polakoff: No challenge for cause.

By Mr. Hogan:

Q. Mr. Adelsberger, there is a question I forgot to ask you: Do you know the union officials of 302, Coulcher and Williams and Radek, the officials who figure in the trial of the so-called Metropolitan Restaurant case in 1937?

A. No, I didn't know them.

Q. Didn't know any of those officials?

A. Will you repeat the three names?

Q. Radek, R-a-d-e-k, Williams and Coulcher, C-o-u-l-c-h-e-r.

A. I don't. I was not personnel manager at those years.

Q. Or Gottesmann, who was not a defendant, who was a witness for the People?

A. I do not.

Mr. Hogan: You didn't know them. We will excuse Mr. Adelsberger.

(Talesman excused.)

[fol. 305] Ruth F. Bien, a talesman (residing at 49 East 96th Street, Manhattan, New York), was then examined on the voir dire as follows:

Examination by Mr. Hogan:

Q. Mrs. Bien——

A. Yes, sir.

Q. And you are a housewife?

A. And I also work as secretary for my husband, who is a physician.

Q. Where is your husband's office?

A. At the same address. It is not really an office, it is really our home. He does not have an office.

Q. Is your husband connected with any hospital?

A. Mount Sinai Hospital.

Q. And how long have you served in a secretarial capacity, which is another way of asking how long you have been married?

A. No, it isn't. I have been his secretary for about three years, and we have been married almost five. During the first two years of our marriage I continued as a school teacher. I taught school for five years, all told.

Q. Where did you go to college?

A. Brooklyn College.

Q. I take it you weren't familiar with any of the names that were called out here?

A. No, I was not familiar with any name at all.

Q. What medical school did your husband attend?

A. Abroad, in Germany.

Q. Have you served as a juror before?

A. Never. I have been called three times to the panels, but dismissed; and the third time I asked to be excused.

Q. Do you think you could be fair to both sides, if selected as a juror in this case?

A. Yes, I do.

Q. You have never served as a juror?

A. No.

Q. Do you think that you could put all sympathy and [fol. 306] prejudice out of your mind and decide the guilt or innocence of these defendants exclusively on the testimony brought forward by the witnesses?

A. I do, yes.

Q. And you appreciate that the jurors should never concern themselves with possible punishment in a case; that that has no part in the deliberations of jurors? Do you understand that?

A. Yes, I do.

Q. And you wouldn't get that tangled up in your thinking in any way, would you?

A. I don't believe so.

Q. That is, the jurors—the function of the jurors is simply to submit a report on the facts in the case. They are the judges of the facts, they simply declare whether the facts in their opinion warrant a verdict of guilty or not guilty. You understand that?

A. Yes, I do.

Q. And it should not be complicated by anything—any thoughts irrelevant to what has been testified to by the witnesses in the case?

A. I understand that.

Q. And would you promise me that if you believed that the defendants in this case have been proved guilty beyond a reasonable doubt by the testimony in the case, that you would find them guilty?

A. Yes, I would.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Have you read anything about this case or discussed the case with anybody, as a result of which you might have an opinion in your mind that would be unfavorable towards either one of these two defendants?

A. I have no unfavorable opinion.

[fol. 307] Q. That is your married name, isn't it, Bien?

A. Bien, you pronounce it.

Q. How do you pronounce it?

A. Bien.

Q. And your husband is Dr. Bien?

A. Yes.

Q. You probably have not ever come in contact with any labor union officials?

A. Well, I have been a member of a labor union.

Q. Oh, have you?

A. Yes.

Q. Which one?

A. The Teachers' Union, Local 5.

Q. While you were acting as a teacher?

A. Yes, sir.

Q. You are no longer in the union at the present time; is that right?

A. I receive their literature, but I do not pay any dues, I am not a member.

Q. You do not pay any more dues?

A. No, sir.

Q. When did you give up your work as a teacher?

A. About two and a half or three years ago. I also had some other contact with labor unions. Before I taught school I worked in a real estate office. I mean, they were occasional contacts with labor unions, nothing special.

Q. Unions have to do with the workers——

A. Painters, plumbers.

Q. (Continuing:) —who worked in houses, like painters, and plumbers?

A. Maintenance—yes.

Q. You do not know any of the officials of any of those unions, do you?

A. Well, I used to be acquainted with a man who was an attorney for several of those unions.

Q. As a result of your past experience, either as a teacher or in any other line in which you may have been em-

ployed, have you formed any opinion that might in any way [fol. 308] establish in your mind a prejudice or feeling against these defendants, that would prevent them from getting a fair and impartial trial at your hands if you are called as a juror?

A. I have no feeling against labor or against labor unions.

Q. If you are selected as a juror, will you take the law from his Honor, regardless of what you think the law is or what you think it should be? Will you?

A. Yes, sir, I will.

Q. Sitting in a jury box is far from just being a reporter and giving a report on facts; it is passing on the guilt or innocence of defendants. You realize that that is a very important mission; and if you are so chosen, and as a result of all the evidence you heard and the law that will be given to you by the Court, if you have a reasonable doubt as to the guilt or innocence of these defendants, would you hesitate in any way to acquit them, if that were so?

A. I will not hesitate.

Q. Do you know of any reason now that you might have in your mind, which would help us to accept or reject you?

A. No, sir.

Mr. Fitzsimmons: Thank you. No challenge for cause.

Mr. Hogan: We will excuse Mrs. Bien.

(Talesman excused.)

Malcolm Oakes, a talesman, (residing at 108 East 86th Street, Manhattan, New York), was then examined on the voir dire as follows:

Examination by Mr. Hogan:

Q. Mr. Oakes, what is your occupation?

A. I work for the Standard Vacuum Oil Company.

[fol. 309] Q. And what do you do with the oil company?

A. I am an assistant purchasing agent.

Q. How long have you served in that capacity?

A. For nine years.

Q. Prior to that?

A. I was connected with a New York Stock Exchange firm for six years.

Q. Were you born in New York City?

A. No, sir, I was not.

Q. Where?

A. East Orange, New Jersey.

Q. Now, one of the defendants resides in New Jersey. Do you happen to know the defendant Fay?

A. No, I do not.

Q. So far as you are aware, do you know any friends of the defendants in this case?

A. No, sir.

Q. Have you had dealings with any of the companies, the names of which have been mentioned in this case?

A. No, I have not.

Q. Do you know any of the persons whose names were read off?

A. No, I do not.

Q. Have you read anything about the case that has formed any opinion—that has resulted in the formation of an opinion?

A. As regards the defendants?

Q. Yes.

A. No, sir, I have not.

Q. Do you think you could be a fair and impartial juror in this case?

A. I think I could.

Q. Have you served as a juror before?

A. Yes, I have.

Q. And you could follow the Judge's charge in this case?

A. Yes.

Q. Do you have any doubt about your ability to be absolutely impartial?

A. No, I have not.

Q. And you could base your verdict solely on the testimony in this case?

A. I believe I could, yes.

Q. When you say "I believe," it suggests to me that you [fol. 310] may have a doubt. Is that just a form of——

A. Expression, I think.

Q. (Continuing) —phraseology or form of expression.

A. Yes.

Q. You do not mean that you are guessing that you could?

A. No, sir, I do not.

Q. You definitely know that you could be fair?

A. I do.

Q. In so far as you can anticipate the future?

A. That is right.

Q. You haven't any reservation with respect to it?

A. That is correct.

Q. And you won't permit prejudice or sympathy, if it should arise in your mind, to influence your verdict in any way?

A. No, sir.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Have you read anything about this case, sir?

A. I have read the papers the last few days.

Q. Other than that, no?

A. Other than that, no. Well, I have a recollection of the case in 1943, from having read about it then.

Q. Outside of reading the current papers, the answer is "no"?

A. The answer is "no".

Q. You heard the questions I put to all the other jurors, or most of them?

A. I heard most of them.

Q. Laying aside any prejudices, if you have any. If I put all those questions to you, is there anything that you would like to tell me, that might aid me in either accepting or rejecting you?

A. I didn't hear all the questions, I was at the back of the room, but I think there is nothing that I need to tell you, based on those questions that I did hear.

[fol. 311] Mr. Fitzsimmons: All right, no challenge for cause.

Mr. Hogan: The juror is satisfactory.

Mr. Fitzsimmons: Peremptorily challenged by the defense.

(Talesman excused.)

The Clerk: Jurors, kindly answer and step forward as their names are called. Howard Berusch, James W. Wolff, Guy R. Jenkins, Edward M. Hartmann, Thomas Glover, Mancius S. Hutton.

(The above named talesmen were then sworn collectively by the Court, and thereafter examined.)

HOWARD BERUSCH, a talesman, (residing at 139 West 82nd Street, Manhattan, New York City), was then examined on voir dire as follows:

Examination by Mr. Hogan:

Q. Mr. Berusch, did you recognize any of the names that were called out?

A. No.

Q. And the companies? Have you had any dealings with the companies?

A. No.

Q. What is your occupation?

A. I am a manufacturer of ladies' hosiery.

Q. And how long have you been in that line?

A. I have been in the business—well, my entire business career.

Q. Is it a family business?

A. Family business.

Q. And where is your office?

A. My office is at 320 Fifth Avenue, New York office.

Q. Is there a manufacturing plant also?

A. Yes, in Pennsylvania—Philadelphia.

[fol. 312] Q. How long have you had that plant?

A. Well, we have had the plant this last seven years, but we have been in business for the—well, it is—my father has been in business for forty years, if you——

Q. I see. And are you in the sales end or ——

A. No; I am over-all head. My father is president of the firm, but in practical retirement.

Q. And you visit the plant frequently?

A. Yes.

Q. Do you have any dealings or negotiations with labor union leaders, at the plant?

A. I have indirectly, not directly. We have a man at our plant that handles all that, but it must come—it must pass through my hands before anything is O.K.'d as far as negotiations are concerned.

Q. And have these dealings, indirect, as you have described them——

A. Indirect.

Q. (Continuing:) —left any opinion or prejudice in your mind?

A. Well, I am definitely—I can state, definitely, pro-labor; and when I mention pro-labor, I feel for the little

man—if you know what I mean—the man that works for his dollars. Now, I have had some unpleasant reactions from the labor leaders.

Q. But you have expressed two views——

A. Yes. Yes, because——

Q. You recognize that there is a presumption of innocence which protects the defendants in this case; and I ask you very frankly whether you think the views held by you would work to the prejudice of the defendants in this case?

A. I am afraid that it may, and I am——

The Court: Excused.

Mr. Hogan: Thank you, sir.

(Talesman excused by the Court.)

[fol. 313] JAMES W. WOLFF, a talesman (residing at 270 West End Avenue, Manhattan, New York), was then examined on the voire dire as follows:

By Mr. Hogan:

Q. Mr. Wolff, do you know any of the persons whose names were read off?

A. No, I do not.

Q. Have you had any dealings with the companies?

A. No, sir.

K. What business are you in, sir?

A. I am in the brokerage business.

Q. And how long have you been in the brokerage business?

A. I have been in the brokerage and banking business combined for about 29 years.

Q. You haven't had any dealings with anybody that might be associated with these firms, as far as you know?

A. As far as I know, unless they have changed their names or something like that.

Q. Have you served as a juror before?

A. Yes, I have.

Q. Could you be absolutely fair and impartial in this case?

A. I think so.

Q. You haven't any reservation in your mind about being able to take the oath as a juror and listen with a clear mind to the testimony, and base your verdict solely and exclusively on the testimony?

A. That is right.

Q. And you wouldn't permit prejudice, if it arose, after you were seated as a juror, to influence your verdict in any way?

A. No.

Mr. Hogan: No challenge for cause.

[fol. 314] By Mr. Polakoff:

Q. You say, Mr. Wolff, that you have sat before as a juror in a criminal case?

A. I didn't say a criminal case.

Q. I see. Have you sat as a juror in a criminal case?

A. Well, there have been so many in the past years—as a regular juror—I don't quite remember whether there were any criminal cases included or not. There may have been.

Q. Were you a regular juror in the Court of General Sessions?

A. I was a regular juror. I also was on the Grand Jury, up to 1939, but did not serve on it.

Q. New York County Grand Jury or the Federal Grand Jury?

A. It was the Federal Grand Jury. Then I moved to Westchester County.

Q. Well, the Federal Grand Jury includes Westchester County; the federal district includes 13 counties.

A. No; if you are not a property owner in Westchester County you are taken off the roll of grand jurors.

Q. That wouldn't—I happen to have been Assistant United States Attorney, and I know some of that.

A. Well, you may be right.

Mr. Hogan: There is no Federal Grand Jury in Westchester.

Mr. Polakoff: Federal Grand Jury in New York.

Mr. Hogan: That is different.

Mr. Polakoff: It covers Westchester residents.

Mr. Hogan: Yes, but that is not——

By Mr. Polakoff:

Q. You say you were taken off the Federal Grand Jury when you moved to Westchester?

[fol. 315] A. I was told that because I was not a property owner in Westchester, that my name was removed from the Grand Jury.

Q. You were removed——

A. That is what I was told. I can't——

Q. I see, I understand. So, in any event, you have never served as a Grand Juror?

A. I had answered to the call, but my name had never been drawn in the panel.

Q. Therefore, you had never served as a Grand Juror?

A. That is right.

Q. Have you any prejudices, because of the fact that you were a member of the Grand Jury, against a person charged with crime?

A. No.

Q. And you could give that person a fair and impartial trial?

A. Yes, sir.

Q. You understand that the indictment is only an accusation and is not to be given any value as proof that the defendant may be guilty? Do you understand that, sir?

A. Yes.

Q. And if the court told you that is the law, you would follow it?

A. Yes.

Q. Have you had any experiences, directly or indirectly, with labor disputes?

A. No.

Q. Have you any fixed opinions about labor or its organizers, that would cause you to be prejudiced against the defendants in this case?

A. I don't think my opinions would cause me to be prejudiced. I have opinions.

Q. I have opinions?

A. Well, everybody has.

Q. Are they unfavorable——

Mr. Hogan: I object to declarations of what opinion——

The Court: Yes, sustained.

Mr. Polakoff: May it please your Honor, for the purpose [fol. 316] of exercising a peremptory challenge, not a chal-

lenge for cause; and I believe, for that purpose, I might inquire whether he is prejudiced, whether he has an opinion that is prejudicial against labor.

Mr. Hogan: I think he has answered that, your Honor.

The Court: He said he had opinions, but they would not prejudice him. That is what the Court understood him to say. But go ahead.

Q. Is that correct, sir—you have fixed opinions concerning labor and its organizers?

A. Yes.

Q. Are those opinions prejudicial to labor and its organizers?

A. That is a peculiar——

Mr. Hogan: Your Honor, the only question that is permissible is: Would those opinions prejudice these defendants in any way?

The Court: Of course, labor is not on trial.

By the Court:

Q. Have you any opinions, either as to organized labor or its organizers or officers, that would prejudice you and make you an unfair juror?

A. No.

The Court: All right.

By Mr. Polakoff:

Q. Prior to your employment in the brokerage business, what was your employment?

A. I was in the banking business—a private banking corporation.

[fol. 317] Q. What private banking corporation?

A. A firm that went out of business in 1938, Speyer & Company.

Q. Did they liquidate or were they taken over by——

A. No, they were liquidated.

Q. A voluntary liquidation?

A. (No response.)

Q. Have you discussed this case with anyone?

A. No.

Q. Have you read anything about the case, which would cause you to form an opinion prejudicial to the defendants?

A. No.

Q. Do you know any reason whatsoever why you could not give the defendants and the People a fair and impartial trial?

A. No.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Polakoff: Challenged.

The Court: Excused by the defense.

(Talesman excused.)

Guy R. Jenkins, a talesman (residing at 210 East 73rd Street, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. What is your business, Mr. Jenkins?

A. I am in the insurance business.

Q. And where is your office?

A. 50 Church Street, New York.

Q. And the name of the company?

A. Well, I am both a broker and a life member. The office is the Penn Mutual.

[fol. 318] Q. How long have you been in that business, sir?

A. Since 1921.

Q. And what type of insurance do you write?

A. All kinds except marine.

Q. Have you had dealings with any of the companies that have been mentioned in this courtroom?

A. No, and I know none of the men, except a slight acquaintance, social acquaintance with Arnold Hanger. I believe he is—isn't he a part owner of Mason & Hanger?

Q. Yes.

A. I wouldn't know him if he walked in here, but I have met him once or twice, at a fishing club, and at a lunch club here in New York. But I wouldn't know the gentleman if he walked in here, I think. I might.

Q. And that is the only exception to the answers—that you know nobody else?

A. That is the only exception.

Q. Have you served as a juror before?

A. Yes, I have served definitely in General Sessions in the last ten or twelve years on three juries. I have been on this panel for a long time.

Q. Do you have any doubt of your ability to serve as an impartial juror in this case?

A. No, I have not.

Q. Have you read anything about the case?

A. Yes, I have read a great deal about it.

Q. Did it leave you with any opinion, that you could not lay aside, could not set aside, as to the guilt or innocence——

A. It left me with an opinion, but not that I could not lay aside under oath in the jury room. I have a very definite opinion.

Q. You understand, Mr. Jenkins, or you recall, I should put it, that before you became a special juror you said that you had the ability to set aside any opinion obtained from newspaper reading or any other source?

[fol. 319] A. Yes, I believe I have. I think any decent man can. These men are being tried on certain definite counts, and I am on oath.

Q. And you certainly believed, at the time you signed the questionnaire, that you had that ability?

A. Yes.

Q. Now, what I want to know is, as you sit here at the present time are you confident, are you certain, that whatever that opinion is you can dismiss it entirely from your mind?

A. Yes, I sincerely believe that my conscience would not let me do anything else. But if you ask me if I have an opinion, I have got to answer you that I have an opinion. I would lay it aside; I have to.

Q. But you have no doubt you could dismiss it from your mind?

A. I would have to, or I could not go into the jury room.

Q. That would be in accordance with your oath, as you understand it?

A. Yes, exactly. It might be difficult, but I believe I could do it.

Q. Would you promise me and the attorneys for the defendants that you would base your verdict solely on the testimony in this case?

A. That is right.

Q. And you wouldn't permit prejudice to influence you in any degree?

A. I am quite sure I wouldn't.

Q. Are you just as sure of that as you are of the other answer?

A. Yes, I am, frankly. I might be in their position, who knows?

Mr. Hogan: No challenge for cause.

Mr. Fitzsimmons: Does your Honor want me to go further, under the circumstances?

The Court: Well, I think so.

[fol. 320] By Mr. Fitzsimmons:

Q. Mr. Jenkins, you said you are a friend of Arnold Hanger?

A. Very casual. He and I were in a fishing club some years ago, both members of it. We are members of a rather intimate little lunch club downtown here, but I haven't seen Arnold Hanger in seven or eight years.

Q. Let us go back to the time when you were a member of the fishing club with him. What was the name of it?

A. The Broadhead Angles Club in Pennsylvania. The Broadhead Anglers Club.

Q. And you and he went fishing down there?

A. I just ran into him down there. He was a friend of another member, and he joined it too.

Q. You probably met him with other members?

A. Yes. I probably met him about twice: when I was there he was there.

Q. Did you have a drink with him on a few weekends?

A. No, I don't think I have met Mr. Arnold Hanger over four or five times in my life.

Q. You have a very definite opinion of him, that he is a gentleman, haven't you?

A. Yes, he is a very fine gentleman, and he has got good horses, I believe.

Q. What is the other club?

A. It is a lunch club here in New York. But he has been away so much, I don't believe he has been in the New York club recently. I am trying to say, I don't think I would know him if he walked in here.

Q. You don't mind if I ask you a few questions about him?

A. No.

Q. Where is this luncheon club located?

A. 101 Broad Street.

[fol. 321] Q. How long have you been a member down there?

A. Of that club since 1912.

Q. And how long have you been seeing Mr. Hanger down there?

A. I have not seen Mr. Hanger, to my knowledge, in the last seven or eight years at least—I don't think he has been in the club in the last seven or eight years, because he is out of New York, as I understand it.

Q. You read a great deal about this case?

A. Yes, I have.

Q. Tell us what you read, what has been the basis of your reading?

A. Well, let us be frank about it; I have read Westbrook Pegler, I always read him.

Q. Always read Westbrook Pegler?

A. I always read Westbrook Pegler, that is correct.

Q. Do you think he is quite a writer?

A. I do.

Q. Do you feel that his copy and writings are to be believed?

A. Well, you are asking me; I will answer you.

Q. Yes or no.

A. Yes.

Q. Yes or no, please.

A. Nobody has sued him yet.

Mr. Fitzsimmons: I feel I am wasting time, under the circumstances. May I offer a challenge for cause?

The Court: On what ground?

By the Court:

Q. Do you know Westbrook Pegler?

A. I don't know Westbrook Pegler.

Mr. Fitzsimmons: Well, I will go further and develop this on any number of his articles.

[fol. 322] The Court: Go ahead. Find out his opinion, and whether he could be fair or not; that is all we are concerned about.

By Mr. Fitzsimmons:

Q. When did you first hear about Mr. Joseph Fay?

A. I wouldn't know when, but it was undoubtedly at about the time that Mr. Pegler started to write about him.

Q. That was all of five years ago?

A. Oh, I guess that you know more about it than I do.

Q. I am asking you.

A. I am answering you the best I can, sir.

The Court: I will ask you, Mr. Jenkins.

The Witness: All right.

By the Court:

Q. Have you any opinion one way or the other at the present time about the guilt or innocence of these defendants, formed from what you have read or what you have heard?

A. You want a completely honest answer, of course, your Honor?

Q. Yes, of course.

A. I will put it this way: I have a prejudice against them personally, but I would lay it aside, I would have to, and I would lay it aside.

The Court: I believe I will excuse the juror.

(Talesman excused by the Court.)

The Court: I think at this time we will take a recess until 2 o'clock, and the jurors who have been accepted and all the others prospective jurors, keep in mind what the [fol. 323] Court has said about discussing the case, not forming any opinion, or allowing anybody to talk in your presence or with you about the case. Recess until 2 o'clock.

(Whereupon, a recess was taken until 2 o'clock p. m.)

Afternoon Session. 3/1/1945

EDWARD M. HARTMANN, residing at 120 Cabrini Boulevard, New York, N. Y., a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Hartmann, do you know any of the persons whose names were read out?

A. I do not.

Q. Have you had dealings with any of the firms?

A. No.

Q. So far as you are aware you know of no friends of the defendants in this case?

A. I do not.

Q. What is your occupation, Mr. Hartmann?

A. I have been retired since October 1943.

Q. The Commissioner of Jurors' records indicates you were born in 1875, is that correct?

A. 1875, yes.

Q. Your birthday then——

A. June 23rd.

Q. You are aware of the statutory age limit of 70?

A. Yes.

[fol. 324] Q. You still have some time to go?

A. Yes.

Q. Your health is good, I believe I observed?

A. I hope so.

Q. And your hearing is good?

A. Yes.

Q. Have you served as a juror before?

A. Yes.

Q. Do you know of any reason why you couldn't be fair and impartial to both sides?

A. None whatever.

Q. Would you be just and return your verdict strictly on the testimony in the case?

A. Yes.

Q. Have you read anything about the case, Mr. Hartmann?

A. No, I did not.

Q. You haven't any prejudice against the defendants?

A. None.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Hartmann, prior to retiring you were a vice-president of the——

A. Central Savings Bank.

Q. I assume you have been in the banking business for a great many years?

A. About 50 years.

Q. I see. And you have served in criminal cases before?

A. Yes, I have been a member of this jury, I think, for over 25 years.

Q. And have you served in cases other than murder cases?

A. Oh, yes.

Q. As a member of a special panel?

A. Yes.

Q. Or as a regular juror?

A. No, the special panel.

Q. When did you serve last?

A. Oh, I imagine about five or six years ago.

[fol. 325] Q. Have you been a member of the grand jury, either Federal or State?

A. No, no.

Q. Have you any fixed opinions concerning labor or its representatives which would prevent you from giving the defendants on trial a fair and impartial trial, as well as the people of the State of New York?

A. No, I have none.

Q. Do you know of any reason why you couldn't serve as an impartial juror in this case?

A. None whatever.

Mr. Hogan: The juror is satisfactory.

Mr. Polakoff: Challenged by the defense.

THOMAS GLOVER, residing at 325 East 41st Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Glover, will you tell us your occupation, please?
A. My occupation is dress manufacturer.
Q. And your office is where?
A. 491 Seventh Avenue.
Q. Is that the address of the plant also?
A. Yes, that is right.
Q. The manufacturing plant?
A. That is right.
Q. How long have you been in the dress manufacturing business?
A. Six years.
Q. How many persons do you employ?
A. About 45.
Q. Prior to the time you entered the dress manufacturing [fol. 326] business, what did you do, Mr. Glover?
A. Well, I was in the—well, for two years I didn't do anything, but before that I was in the furniture business down at Sanford, North Carolina.
Q. Where were you born?
A. I was born in Englewood, New Jersey.
Q. Do you know the defendant Fay?
A. I do not.
Q. As far as you are aware, do you know any friends of the defendant Fay?
A. I do not.
Q. Or the defendant Bove?
A. I do not.
Q. How long were your in North Carolina?
A. About four years.
Q. And prior to that where were you?
A. I lived in Washington, D. C., for about 14 years. My father was in the Government. I went to school there.
Q. What position did your father hold in the Government?
A. He was Second Assistant Post Master General under Harding, Coolidge, and Hoover.
Q. Did you work in Washington during that period of time?

A. Oh, yes. For one year, for one summer I worked with the Potomac Power & Electric Company just as—doing clerical duties there, that is all.

Q. In your present connection, do you have dealings with labor union officials?

A. Not myself, no. I tend strictly to the financial part of our business. You see, my wife and I are in business by ourselves, and I tend to strictly the financial part. We have a manager and my wife, tend to all the production, and she does the designing; and then they deal about the price of dresses with the union.

Q. Have you served as a juror before?

A. I have served on no jury at all.

[fol. 327] Q. Have you listened to the questions that have been asked by both sides——

A. Yes.

Q. (Continuing:) Did anything occur to you that you think should properly be conveyed to the attorneys?

A. I do not know of anything.

Q. And is there any doubt in your mind that you could serve and be just to both sides if selected in this case?

A. No doubt whatever.

Q. And you think that you could base your verdict solely on the testimony in this case?

A. I could.

Q. You wouldn't permit prejudice or sympathy to influence that verdict in any way?

A. No.

Q. And if you are convinced by the testimony and only the testimony that these defendants are guilty of the crimes with which they are charged in the indictment, you wouldn't hesitate to convict?

A. I would not.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Glover, has your dress manufacturing firm had any labor difficulties whatsoever?

A. No. We have not had any labor difficulties, no.

Q. During the entire eight years?

A. No. Oh, little arguments about prices of dresses, something like that, maybe. No major difficulty.

Q. You have no opinions that would cause you to be prejudiced against the defendants?

A. I do not.

Q. Or prejudiced against the People of the State of New York?

A. No.

Q. You have heard the previous questions of both Mr. Fitzsimmons, Mr. Hogan and myself?

A. Surely.

[fol. 228] Q. Concerning procedure in criminal trials?

A. That is right.

Q. There is no need of repeating them?

A. No.

Q. Do you think there is any information that we should know before we decide whether or not to accept you as a juror?

A. I don't know of anything.

Q. You haven't read anything or discussed this case in any way which would cause you to form an opinion?

A. I knew nothing about it until Monday.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Polakoff: Satisfactory.

(The Talesman was accepted and sworn as Juror No. 6.)

Mancius H. Hutton, residing at 470 West 24th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Hutton, do you know any of the persons whose names were read out by the attorneys in this case?

A. No, sir, I do not.

Q. Have you had any dealings with any of the firms?

A. No, sir, I have not.

Q. And what is your occupation?

A. I have been retired for about, since 1918.

Q. And prior to that you were in what business?

A. I was, prior to that for two years, I was laboratory [fol. 329] engineer with the Automobile Club of America.

Q. So that you haven't—going back to your active days, you haven't had any dealing with labor union officials?

A. No, sir, none at all.

Q. Have you read anything about this case?

A. I just remember that I read probably at the time of the indictment, but that is all.

Q. Did what you read, at that time, or any conversations you had with anybody, give you any opinion which is prejudicial to the defendants?

A. None at all.

Q. And have you any prejudice against labor union officials?

A. No, sir.

Q. You served as a juror before?

A. Yes, sir.

Q. You know the rules of criminal cases?

A. Yes, sir.

Q. And you believe that you are fully able to accept the law as the Judge will give it to you at the end of this case and be guided strictly by that?

A. Yes, sir.

Q. Would you base your verdict strictly on the testimony in this case, and let nothing else influence your verdict?

A. Yes, sir.

Q. Do you think of anything now that we as attorneys should know with respect to what is going on in your mind, with regard to the case; that would be helpful?

A. Not that I know of anything.

Q. You can be just and impartial to both sides?

A. Yes.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Hutton, you have been retired?

A. Yes, sir.

[fol. 330] Q. For about the past 18 years?

A. Yes, sir.

Q. Prior to that you were with the Automobile Club of America?

A. Yes, sir.

Q. For how long, sir?

A. For about two years.

Q. What was your business or occupation?

A. Well, I was a laborato. engineer. They had a laboratory there, a testing laboratory.

Q. In business for yourself?

A. No, for the commercial things that came in to be tested out in connection with automobiles.

Q. And what was the name of the laboratory?

A. It was the—belonged to the Automobile Club of America.

Q. Oh, I see. You were with that for how long a time?

A. About two years, around two years.

Q. I mean, other than your experience in the automobile business, have you had any other business or occupation?

A. Well, I have been connected, once, I think, for a while with the American Radiator Company, and I was with the American Museum of Safety.

Q. Where do you live at the present time?

A. At 470 West 24th Street.

Q. You have served as a member of the Special Panel before?

A. Yes, sir.

Q. For a good number of years?

A. I have been on the panel for quite a number of years, yes.

Q. Have you served on many——

A. I have only served about once or twice.

Q. Were they murder cases?

A. Homicide cases, yes.

Q. You have heard questions heretofore put to the prospective jurors by both sides. Do you think there is any information we want to know before we pass upon your eligibility as a juror?

A. I do not know, no.

[fol. 331] Q. You have no fixed opinions concerning labor that might prejudice you against the defendants in any way?

A. No, sir.

Q. You haven't discussed the case or read anything that might cause you to be prejudiced against the defendants?

A. No, sir.

Q. Have you been a member of the grand jury?

A. No, sir.

Q. Have you sa in civil cases?

A. Oh, I was in the City Court way back, about twenty-odd years ago; just the one term.

Q. Where was the place of business of the Automobile Club of America; New York City?

A. Yes.

Q. It was in New York City?

A. Yes, it was in New York City.

Q. New York County?

A. Yes.

Mr. Polakoff: No challenge.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Polakoff: Challenged by the defendants.

(Talesman excused.)

The Clerk of the Court: Jurors, kindly answer and step forward as your names are called:

Allen B. Kendrick.
Robert C. Norman, Jr.
Phil A. Alexander.
Robert D. North.
Wm. H. Atkins.
Frank V. Forrestal.

(The respective talesmen were then sworn collectively by the Court, and thereafter examined:)

[fol. 332] Allen B. Kendrick, residing at 600 West 115th Street, New York, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. What is your business address?

A. 120 Broadway.

Q. And your occupation is——

A. Broker.

Q. What type of brokerage house?

A. It is a stock and bond house.

Q. And the name of it is?

A. Burton, Cluett & Dana.

Q. And before that?

A. I had my own firm; that was Farrington & Coleman. That is, I was a partner of that firm.

Q. Have you had dealings with any of the firms, the names of which have been mentioned?

A. No, I have not.

Q. Do you know any of the persons whose names were given?

A. I do not.

Q. You are not acquainted with any friends of the defendants in this case?

A. That is true.

Q. Have you served as a juror before?

A. Yes.

Q. Were you born in New York City?

A. No, I was born in Texas.

Q. Do you know of any reason why you couldn't be fair and impartial to both sides if selected as a juror in this case?

A. None, except the reading that I have had, which might influence me, with Westbrook Pegler, which I have read since he has been writing. That is the only thing.

Q. Let me examine into that. You have read Pegler?

A. Yes.

Q. You appreciate that anything you read in a newspaper is hearsay?

A. That is true, yes.

[fol. 333] Q. And reported by a newspaper man?

A. Yes.

Q. And when you signed the Questionnaire in the County Clerk's office, you gave it as your conclusion at that time that you could in fairness to a prospective defendant or the People of the State of New York, set aside any opinion that you may have gained from newspaper reading or any other source?

A. That is correct.

Mr. Fitzsimmons: Objection to that question.

The Court: Overruled.

Mr. Fitzsimmons: Exception.

Q. Now, as you sit there, and this is the moment that counts, are you convinced, in fairness to these defendants, that you can forget any opinion and can set aside that opinion?

A. I think I can.

Q. Do you have any doubt about it?

A. No, I think not.

Q. Well, if you have now, just turn to his Honor and tell him, and we will consent to excuse you, if you think you can't be fair and impartial, because naturally neither side wants anybody to step into the jury box with even a tiny slant in the direction of the People or in the direction of the defendants. We want to start on an even plane and let the testimony speak for itself. You appreciate that?

A. I do.

Q. Now, do you tell me that you can be strictly fair and impartial in this case?

A. Well, if I may say so, I read quite a bit about this case back in 1943.

Q. Would you prefer to be excused?——

The Court: Excused.

(Talesman excused.)

[fol. 334] Robert C. Norman, Jr., residing at 27 Park Avenue, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Norman, your occupation, please?

A. Real estate and insurance broker, in my own name.

Q. How long have you been in that business, Mr. Norman?

A. Since about 1929.

Q. Do you come in contact with any labor union officials in that work?

A. No, I do not.

Q. Do you know the defendants in this case?

A. No, I do not.

Q. Have you had any dealings with any firm, the names of which were mentioned in this court room?

A. As far as I know, I don't recall any.

Q. Do you know any of the officials of the firm that were mentioned?

A. No, I do not.

Q. You are not aware that you are friendly with any name that has been mentioned here by Mr. Fitzsimmons, Mr. Polakoff or myself?

A. I don't recall any.

Q. Do you know of any reason why you couldn't be fair and impartial to both sides in this case?

A. I don't know of any.

Q. Have you served as a juror before?

A. A good many times.

Q. So you are familiar with the experience?

A. Yes, sir.

Q. And you can make a pretty good forecast of what your mind is apt to be if you sit in the jury box, is that true, Mr. Norman?

A. I think so, yes.

Q. Would you promise both sides you would be just and impartial and be guided with respect to your verdict only by the testimony you hear from the witnesses?

A. Yes, sir, I would.

[fol. 335] Q. You wouldn't be influenced by sympathy or prejudice of any kind if it did arise in your mind at any time?

A. To the best of my ability, I would not.

Q. You tell me you haven't any prejudice at this point?

A. No, I have not.

Q. And if for some unforeseeable reason it did arise in your mind, you would still be able to set it aside and say, "My duty is to decide this case on the testimony and only the testimony"?

A. That is correct, yes, sir.

Mr. Hogan: Thank you.

By Mr. Polakoff:

Q. Mr. Norman, have you read anything at all that would cause you to have an impression in this case?

A. I may have read something, but it didn't make much of an impression, as far as I can recall. I don't remember reading it, but I say I might have.

Q. That is all right, as long as you don't remember it and you are sure it made no impression. Have you discussed this case with anyone?

A. No, sir.

Q. Has anyone discussed it with you?

A. No, sir.

Q. You have served as a special juror before?

A. Yes. I think once I did, over in a criminal case.

Q. A murder case?

A. Yes, I think that was a murder case.

Q. You have served in other criminal cases as a regular juror?

A. No. I think I was mostly over in the General Sessions.

Q. That is the criminal——

A. I don't mean General Sessions.

[fol. 336] Q. The Supreme Court, you mean?

A. No; just ordinary——

Q. Civil cases?

A. Civil cases, accidents and such things.

Q. That would probably be the Supreme Court or City Court.

A. Yes.

Q. In your business, in your real estate business, have you had any difficulties with labor unions or their representives?

A. No, I have not.

Q. Have you any fixed opinion concerning labor or its representatives, that would cause you to be prejudical towards the defendants in this case?

A. I say no.

Q. You mean that, sir, when you say no, there is no reservation?

A. No, sir.

Q. But just a method of expression. Do you know of any fact or reason that we should be acquainted with, so that we may properly determine whether to select you as a juror or not?

A. Would you mind saying that again?

Q. Do you know of any fact we haven't questioned you about, that you feel we ought to know, both sides, in order properly to determine whether to select you as a juror?

A. None that I know of.

Mr. Polakoff: No challenge.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Polakoff: Challenged by the defendant.

(Talesman excused.)

[fol. 337] PHIL A. ALEXANDER, residing at 325 West 57th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Alexander, do you know of any reason why you couldn't be just and impartial in this case?

A. Except that I have read the comments of Mr. Pegler in the Evening Journal and the Telegram.

Q. Well, that is true of thousands and thousands of people, but did it create any opinion in your mind with respect to the innocence or guilt of these defendants which you couldn't set aside?

A. I think it did, sir.

The Court: Do you believe everything you read in the newspapers?

The Talesman: Not everything.

The Court: Just as regards that?

The Talesman: Yes.

The Court: Excused.

(Talesman excused.)

ROBERT D. NORTH, residing at 106 Cabrini Boulevard, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. North, do you know any of the persons whose names were read in this court room?

A. No, sir.

Q. Do you know or have you had dealings with any of the [fol. 338] firms or do you know any of the officials in the firms whose names were mentioned?

A. No.

Q. Your occupation, Mr. North?

A. Security Control officer of the Pan-American Airways.

Q. In that connection have you had dealings or negotiations with any labor union officials?

A. No, sir.

Q. Have you served as a juror before?

A. Yes.

Q. On criminal cases?

A. Yes.

Q. Do you know the rules that guide us?

A. Yes.

Q. You are able to follow the Judge's charge in these matters?

A. Yes.

Q. Do you know of any reason why you couldn't be just and impartial in this case?

A. No, sir.

Q. Would you promise both sides that you would base your verdict, if accepted as a juror, on the testimony as it comes from the witnesses?

A. Yes, sir.

Q. Have you read anything about the case?

A. Only the fact that an indictment—I read at that time, I read in the Times, that is all; just news items.

Q. In 1943 you read something about the finding of a grand jury?

A. Yes.

Q. You appreciate that that is of no evidentiary weight, at all, do you not?

A. Yes, sir.

Q. It is simply a pleading, a paper, that is served to bring people into court and that the issue is tried here and decided solely on the testimony of witnesses?

A. Yes, sir.

Q. All that is clear to you, and you would base your verdict strictly on the testimony?

A. Yes.

[fol. 339] Q. And you won't permit prejudice or sympathy to influence that verdict in any way, would you?

A. No, sir.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. How long have you lived in New York, Mr. North?

A. Over twenty years.

Q. Were you born here?

A. No, sir.

Q. Where were you born?

A. In Martinsburg, West Virginia.

Q. How long have you been with Pan-American?

A. I am in the third year now.

Q. Your office is here in New York, is it?

A. Chrysler Building.

Q. What particular type of work do you do for Pan-American?

A. Well, it is security control. We keep a check on all employees or prospective employees to see if they avoid certain dangers, any sabotage, or anything of that kind —to see that they are perfectly loyal persons, loyal to the country and to the company.

Q. I suppose you have a large staff to do that because of the size of your business, the size of Pan American's business?

A. No. I am only in the New York office. They have the same thing in each division, wherever they are located, you see. That is a requirement of the Government. We work in conjunction with the War—with the Army and Navy Transport Command.

Q. Are you the only one in the Security Department here in New York?

A. No. There is a day man and I am a night man.

Q. Now, may I ask what company or concern you are employed with before you went with Pan American.

[fol. 340] A. American Automobile Association.

Q. Did you ever come in contact with labor leaders, or have anything to do with unions, in negotiating contracts on behalf of your firm or employees when you were with the automobile concern?

A. No.

Mr. Hogan: The People will excuse Mr. North.

William H. Atkins, residing at Greenwich, Connecticut, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Do you have a New York address, too, Mr. Atkins?

A. Well, I did up until last October. Last October I moved to Connecticut.

Q. Well, is that a permanent residence in Connecticut?

A. It is as far as I am concerned, yes.

Q. Well, have you communicated that to the Commissioner of Jurors?

A. No, I haven't. I didn't get an opportunity to.

Q. Do you have an apartment in New York County at the present time?

A. Well, I have a lease, but I have subleased the apartment and as soon as my original lease runs out, I am asking to give up the apartment.

Q. So that you don't intend to come back to New York?

A. Yes.

Mr. Hogan: I think the juror is disqualified, your Honor.

[fol. 341] The Court: Well, he was still living here. You still consider your residence in New York, or Connecticut?

The Talesman: Well, I do, I consider it in Connecticut.

The Court: But you haven't moved, though, yet?

The Talesman: Definitely I have.

The Court: Excused.

(Talesman excused.)

Frank C. Forrestal, residing at 1035 Park Avenue, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Forrestal, you are connected with the Commercial National Bank, is that correct?

A. That is right, sir.

Q. How long have you been with that bank?

A. 16 years.

Q. Prior to that were you in the banking business?

A. Twenty years in the Farmers Loan & Trust Company.

Q. Have you had any dealings with the firms, the names of which were mentioned here?

A. No, sir.

Q. Do you know any of the persons whose names were mentioned?

A. No, sir.

Q. So far as you are aware, you are not acquainted with any friends of the defendants?

A. As far as I know.

Q. Have you served as a juror before?

A. I was notified once before but wasn't selected.

[fol. 342] Q. You haven't served in civil cases?

A. Never served on any case.

Q. Now, I think during the last two or three days you heard a great many rules which guide us in criminal cases, enunciated in questions?

A. Yes.

Q. Is there any of those with respect to which you disagree in so far as that you couldn't follow the charge of the Judge, if they were incorporated in that charge?

A. I have no reservation.

Q. Do you know of any reason why you couldn't be just and impartial in this case?

A. I know of no reason.

Q. Have you read anything about the case, Mr. Forrestal?

A. Just casually in the last few days.

Q. You haven't formed any opinion that would be prejudicial to either side?

A. None whatsoever.

Q. You haven't any prejudice that you would permit to influence your verdict in any way?

A. No.

Q. You promise, if selected as a juror, that you would permit only the testimony as given by the witnesses to guide you with respect to finding your verdict?

A. Exactly.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Forrestal, are you the brother of our Secretary of the Navy?

A. I am his cousin.

Q. You are his cousin?

A. Yes, sir.

Q. What bank did you say you were connected with?

A. Commercial National Bank, 46 Wall Street.

[fol. 343] Q. How long have you been down there?

A. Sixteen years.

Q. In your experience down at the bank, have you come in contact with any of the firms that were mentioned by the attorneys here in court?

A. No, sir.

Q. Or with any of their officers or directors or employees?

A. Not as far as I know.

Q. You don't know any of the people in this case?

A. Not as far as I know.

Q. How much reading have you done outside of what you have told us in the last few days in connection with this case?

A. I really knew nothing about the case until I was notified by my jury notice.

Q. What paper do you read in the afternoon?

A. New York Sun.

Q. Have you ever been the complainant in any criminal case?

A. No, sir.

Q. You served once, you said, as a special juror?

A. I was notified once, but was not selected.

Q. You heard all the questions I put to the other gentlemen here?

A. Yes.

Q. Concerning opinions that they have acquired through the years relating to labor, labor organizations, and things labor. As the result of the views which you have acquired through the years, would you say that you have any prejudice in your mind that you could tell us about?

A. No prejudice.

Q. Without my asking more questions.

A. Not as far as I know.

Q. There is nothing else you want to tell me that would help me make up my mind whether to accept you or reject you?

A. Nothing in particular.

[fol. 344] Q. Thanks.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: Peremptorily challenged by the defense.

The Clerk of the Court: Jurors, kindly answer and step forward as your names are called:

Alonzo Walling.
John W. Weber, Jr.
Emanuel Siegel.
Louis Spahn.
Joseph Dillon.
Louise G. Harding.

(The respective talesmen were then sworn collectively by the Court, and thereafter examined.)

ALONZO WALLING, residing at 201 West 54th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Walling, do you mind telling us your age?

A. 69.

Q. And your hearing is perfectly good, is it?

A. I think so.

Q. Have you served as a juror recently?

A. About two years ago.

Q. Do you know any of the persons whose names were mentioned in this case?

A. No. I do not.

[fol. 345] Q. Have you had dealings with any of the firms?

A. No. I haven't.

Q. And what is your occupation, if you are presently employed, sir?

A. I am not employed at present. I spent 20 years, a little over 20 years, up until four years ago, as a life insurance underwriter.

Q. With what company, Mr. Walling?

A. Six or seven.

Q. Did you have your own office?

A. No. My main office was with the Equitable. I did business with the Connecticut General, I did business with the Travelers, and three or four other companies.

Q. I see. How long are you retired, sir?

A. About four years ago.

Q. Did you have any business with labor union officials during your insurance career?

A. No, never have.

Q. Do you know of any reason why you couldn't be fair and impartial in this case?

A. No.

Q. Have you read anything about the case?

A. Only in the Tribune yesterday morning.

Q. Prior to that you hadn't read anything?

A. No, I hadn't.

Q. And that didn't cause any opinion to form in your mind, which you couldn't readily set aside if you were called upon to serve as a juror in this case?

A. That only stated what I heard here in the court room.

Q. I see. If selected as a juror, you would promise that you wouldn't be guided in any way by prejudice or sympathy?

A. No, I would not.

Q. And is there anything suggested by any question asked by either side, that at the time you heard it you said to your-
[fol. 346] self, "Well, if I am asked that question, I will volunteer this information?"

A. Nothing that I know of.

Q. Nothing which in fairness to either side you ought to volunteer at this time?

A. I say not that I know of.

Q. I see. Thank you, sir.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. You said something, Mr. Walling, about what you heard in the court room. I didn't quite understand that.

A. Simply the presentation.

Q. Oh, by attorneys asking questions?

A. Yes, just that.

Q. Where do you live, Mr. Walling, in New York?

A. 54th Street, 201.

Q. Are you retired at the present time?

A. Yes.

Q. How much reading did you do concerning Mr. Fay at any time?

A. All I read was yesterday morning's Tribune.

Q. And you never discussed Mr. Fay with anyone, did you?

A. Never.

Q. You never expressed any opinion about this case to anyone, did you?

A. I have not.

Q. Were you born in New York, sir?

A. Born in New Jersey.

Q. Whereabout in New Jersey?

A. Manasquan.

Q. Down on the North Jersey Coast?

A. Right.

Q. Well, through the years you formed opinions about labor and labor unions, and strikes and picket lines and lock-outs and walk-outs, and so on. As a result of the opinions that you formed, is there anything existing in your mind [fol. 347] today which might prevent you from giving a fair and impartial trial to either one or both of these defendants?

A. Not that I know of.

Q. Naturally, in your type of business, you never came in contact with labor or labor leaders?

A. No, I never did.

Q. Did you ever write any of them up on life insurance?

A. No. I can't say that I ever had that privilege.

Q. How long have you been on the special panel, sir?

A. 10 or 12 years.

Q. How many cases have you served on in that time?

A. I think I have averaged every two years.

Q. You were called every two years, but did you serve on a case every two years?

A. No. I remember one murder case I didn't serve on.

Q. Otherwis you served almost every time you were called?

A. So far as I recollect, I did.

Q. You served on cases other than murder case, too, I suppose?

A. Yes, I have.

Q. Did you serve on the Hines case?

A. No.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The People will excuse Mr. Walling.

(Talesman excused.)

JOHN W. WEBER, JR., a talesman (residing at 975 Park Avenue, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Weber, do you know any persons whose names were read out in the court-room?

[fol. 348] A. Well, I have met on several occasions, Mr. Kaiser, which is the only name that sounds at all familiar to me.

Q. It is just an acquaintance, you say?

A. Yes, that is all. That is all.

Q. And did you have dealings, Mr. Weber, with any of the firms that were mentioned?

A. No, sir. No, sir. I have had dealings with some of Mr. Kaiser's firms, but none of the firms mentioned.

Q. Have you served as a juror before?

A. Never before.

Q. And your occupation is what?

A. I am vice-president of a marine paint manufacturer.

Q. And how long have you been in that manufacturing business?

A. About seventeen years.

Q. Prior to that were you in the manufacturing line?

A. No; prior to that I was in the steamship business.

Q. And this is paint for boats, I take it?

A. Yes, it is paint for ships only.

Q. A great deal of your work at the present time is Government work?

A. Entirely.

Q. And have you come in contact with labor union officials in that capacity at all?

A. Yes, a great deal, because one of my principal duties in the company is to settle on labor contacts and to appear before the War Labor Board Panel, which I have done; so that I would say that half of my time is taken up with labor matters.

Q. Have you discussed the defendants Fay and Bove with any labor union officials?

A. No, sir.

Q. Have you read anything about this case?

A. Just recently, just very recently, in the last two days.

Q. Since this trial started?

A. That is correct.

Q. And has your reading caused you to form any opinion [fol. 349] which would be prejudicial to either side of the case?

A. No, sir. No.

Q. Do you think you could be just and fair to both sides of the case?

A. That is very hard to answer.

Q. Well, suppose you tell us why it is difficult to answer?

A. Because I am involved continually in labor matters—continually—and I am—I sign all of the labor contracts,

and my dealings are with the union practically all year round, on minor disputes, as well as the signing of contracts every year, which comes every autumn.

Q. You mean, then, that it would be difficult to keep your daily experiences out of your mind when you are serving as a juror?

A. Exactly.

The Court: Excused.

(Talesman excused by the Court.)

EMANUEL SEIGEL, a talesman, (residing at 317 West 93rd Street, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Seigel, is there anything that occurs to you that would make it difficult for you to sit as a juror in this case?

A. Not that I know of.

Q. Do you know any of the persons whose names were read off?

A. I do not.

Q. Have you had any dealings with any of these firms?

A. No, sir.

Q. Have you served as a juror before?

A. I have.

Q. What is your business at the present time?

A. I am not occupied at the moment with anybody. I [fol. 350] have been sick. I have been sick for about six months.

Q. Well, do——

A. I am recuperating now.

Q. Would your sickness make it difficult for you to serve in this case?

A. I don't think so.

Q. Are you still under a doctor's care?

A. I am, yes, sir.

Q. Is there anything in that connection that you want to communicate to the Judge?

A. Only——

Q. With respect to your——

By the Court:

Q. Are you able to sit through a trial here that might take a couple of days?

A. That is something I couldn't say. I go to the doctor once a week.

The Court: I think he should be excused. We won't put the burden on you, anyway. Excused.

The Talesman: Thank you.

(Talesman excused by the Court.)

Louis Spahn, a talesman, (residing at 262 Central Park West, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Spahn, what is your occupation?

A. I am an apartment house superintendent.

Q. And how long have you worked in that capacity, Mr. Spahn?

A. Nine years.

Q. And prior to that what was your occupation?

[fol. 351] A. I worked for the Board of Education, in the reform school for boys.

Q. Where was the reform school?

A. In Flushing, Long Island.

Q. Was that a Civil Service position?

A. Non-competitive.

Q. How long did you serve in that capacity?

A. A little over a year.

Q. And prior to that, which would bring us ten years back, what did you do?

A. I was in the building line, contractor and builder.

Q. Your own business, sir?

A. Yes, sir.

Q. And what type of building did you——

A. Private homes.

Q. How long had you been in that business?

A. Nine, ten years.

Q. Who owns the apartment house where you are working at the present time?

A. Sisbrothers, Incorporated.

Q. How do you spell that?

A. S-i-s-b-r-o-t-h-e-r-s—that is one word.

Q. A combination of a particular name and the brothers, is that it, or is there a——

A. It is just sisters and brothers.

Q. Sisters and brothers?

A. That is right.

Q. Do you belong to a labor union?

A. Not at present.

Q. Were you a member of local 209—is that it?

A. No, sir.

Q. What was the local?

A. Well, I never belonged to any of the building service unions. I belonged to the United Brotherhood of Carpenters and Joiners of America.

Q. That was prior to your contracting business?

A. That is right. And I also was a member of the International Association of Machinists, all—both affiliated with the A. F. of L.

[fol. 352] Q. There is a building superintendents' local?

A. That is right.

Q. But you are not a member of it?

A. No, sir.

Q. Do you know any labor union officials?

A. No, sir, I do not.

Q. Have you served on a jury before?

A. I have been called twice, but never served.

Q. Have you read about this case, Mr. Spahn?

A. Only since Monday

Q. You have not formed any opinion that would be prejudicial to either side?

A. No, sir.

Q. Do you know of any reason why you could not be just and fair in this case?

A. No, sir, I do not.

Q. And if you are selected as a juror, would you promise that you would not permit prejudice or sympathy to influence your verdict in any way?

A. Yes, sir.

Q. If you are convinced beyond a reasonable doubt that the defendants are guilty of the crimes charged in the indictment, you would not hesitate to convict?

A. No, sir.

Q. Is there anything new, that has not been suggested by a question, which you think you ought to volunteer, in fairness to either side?

A. Nothing that I know of.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. You pronounce that Mr. Spahn, don't you?

A. S-p-a-h-n, that is right.

Q. How long had you been a carpenter, prior to going into business?

A. I was carpenter about twelve years, eleven years.

[fol. 353] Q. And born in New York, I presume?

A. That is right.

Q. Lived here most of your life?

A. New York and Brooklyn.

Q. Have you ever been a complainant in any criminal case?

A. No, sir.

Q. You told Mr. Hogan that you had not formed any opinion that might in any way set up in your mind prejudice, or anything else that you might want to term it, that would keep you from giving a fair and impartial trial both to the defendants and to the People of the State of New York?

A. That is correct.

Q. I presume that you heard all the questions that were put to the various jurors, concerning their knowledge of the usual elementary rules of law that are applied to criminal cases of this type. And you do not disagree with most of the answers, that were given by you?

A. No, sir, I do not.

Q. Is there anything at all that might suggest itself to you that you might want to tell about, so that I might make up my mind as to whether to accept or reject you?

A. There is nothing I can think of at the moment.

Mr. Fitzsimmons: Thank you. No challenge for cause.

Mr. Hogan: The People will excuse Mr. Spahn.

(Talesman excused.)

The Court: The Court will take a short recess. Please do not talk, listen, or form an opinion about the case, until it is finally submitted. A short recess.

(Whereupon a short recess was taken.)

[fol. 354] JOSEPH DILLON, a talesman, (residing at 13 Christopher Street, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Dillon, your occupation, please.

A. Public relations.

Q. In what company is that?

A. With the Western Electric Company.

Q. As a public relations counsel, do you have dealings with labor union officials at all?

A. Not with the union officials, no.

Q. How long have you been with the Western Electric?

A. Nearly two years.

Q. And prior to that?

A. Before that I was with the United Press.

Q. As a correspondent?

A. No—in sales promotion.

Q. How long with the United Press, Mr. Dillon?

A. About two years. And before that I was with an advertising agency.

Q. How long in New York?

A. Ten years.

Q. Do you know the defendants?

A. No.

Q. As far as you are aware, do you know any friends of the defendants?

A. No.

Q. Have you had any dealings in advertising work—your advertising work, or at any time, with any of the firms, the names of which have been mentioned here?

A. No.

Q. Do you know of any reason why you could not be just and impartial in this case?

A. No, I do not.

Q. Have you served as a juror, Mr. Dillon?

A. Well, I am called rather frequently, but have never served on a jury.

Q. Do you think that you could be fair to both sides in this case?

A. Yes.

[fol. 355] Q. You haven't any opinion that is prejudicial to the defendants?

A. No. I might say that I read some facts about the Hodcarriers' Union at one time, I guess about two years ago. That is all that I know about it.

Q. And there isn't any opinion in your mind, that you could not readily set aside?

A. No.

Q. You realize that anything that you read about the union, without qualifying it or characterizing it in any way, could not be held in favor of or against the defendants?

A. That is right.

Q. We are interested only in getting the verdict on the testimony that is brought into the courtroom; you appreciate that?

A. That is right.

Q. And if the verdict can be acquittal or conviction—but it must be based on the testimony.

A. Yes, sir.

Q. And are you prepared, if you take an oath as a juror, to do that, without permitting any prejudice or sympathy to influence your verdict in any way?

A. Yes, I am.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Dillon, did I understand you to say that you had never served on a jury in a criminal case?

A. I was selected as a juror, on one day, but the next day the case did not go to trial.

Q. I see. Our records on the cards indicate that you have been called three times in the last two years. There seems to be some indication that you may have served. Of course, the cards may be wrong. Have you served, actually served [fol. 356] on a jury trial, during the last two years?

A. Only in that one instance where I said I was selected, but the case did not go to trial.

Q. Had you previously served as a juror in a criminal trial?

A No.

Q. Mr. Bove, is a vice-president of the International Hodcarriers' Union. Has what you read left any impression on you, that you could not put out of your mind in deciding this case?

A. No, it has not.

Q. Were they Pegler articles?

A. Yes.

Q. Mr. Pegler has been very vitriolic towards those individuals he apparently does not like. That has included individuals in many walks of life.

A. I agree with you.

Q. You agree with everything that you have read by Mr. Pegler?

A. No, I say I agree with you about Mr. Pegler.

Q. In spite of the fact that you have read his articles, and the name-calling that he has indulged in, you feel that it has left no impression on you that would prejudice you in the trial of this case, against these defendants Bove and Fay?

A. No, it did not.

Q. What is your present occupation, sir?

A. Public relations work, writing and editing.

Q. Does that bring you in contact with labor unions?

A. The only contact my department has with labor is—all that I know is that we have a girl who clips stories from the newspapers and periodicals, on labor. What happens to the stories, I don't know. We may occasionally issue a release that has to do with our own labor problems on matters. However, I have never written any of them.

Q. And your contact with labor has been such that it has left no prejudicial impression upon you?

A. No, none whatever, no.

[fol. 357] Q. Either through personal inconvenience or——

A. No.

Q. I think I heard you say that you were connected with the Associated Press?

A. United Press.

Q. United Press. As a reporter?

A. No, as—no, promotion.

Q. Oh, I see.

A. It is a regular sales promotion.

Q. You have heard the question put to previous jurors and prospective jurors?

A. Yes.

Q. Concerning the rules that are followed in criminal cases?

A. Yes.

Q. Are you prepared to follow the law as laid down by the Court?

A. I am.

Q. And give the defendants the benefit of a reasonable doubt, if one exists?

A. Yes.

Q. Do you know of any reason that would prevent you from being a fair and impartial juror towards both sides, both the People and the defendants?

A. No, I don't.

Mr. Polakoff: No challenge.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Polakoff: Satisfactory.

(The talesman was accepted and sworn as Juror No. 7.)

Louise G. Harding, a taleswoman (residing at 31 West 12th Street, Manhattan, New York), was then examined on the voir dire as follows:

Q. Mrs. Harding, would you tell us your husband's occupation?

A. Public relations counsel.

[fol. 358] Q. A public relations counsel? What firm is your husband employed by?

A. He is in business for himself.

Q. And his office is where?

A. 315 Fourth Avenue.

Q. And are you engaged in the business in any way?

A. No, sir.

Q. Just a housewife and as the——

A. I am full-time Red Cross volunteer worker now.

Q. I see. Would your service here interfere with that in any way?

A. It could be arranged.

Q. What are your hours at the present time, Mrs. Harding?

A. Well, I am in the ward at Bellevue at fifteen minutes before eight in the morning, and I work until about half past four, five days a week.

Q. You mean it could be arranged that you could take other hours?

A. Yes.

Q. Do you think that you could add to jury service that type of service—and it must be very hard work, I am sure?

A. Well, I took no vacation, sir, last summer, and consequently I think I could be excused if I were needed or wished for it.

Q. Do you know any of the persons whose names have been——

A. No, sir; the only name familiar was that of Mr. Kaiser.

Q. Is that familiar because of your reading or——

A. Yes. I have no acquaintance with Mr. Kaiser.

Q. How long has your husband been in the public relations field?

A. Since 1931.

Q. Prior to that, Mrs. Harding?

A. In a manufacturing company.

Q. What type of manufacturing?

A. They were making paper from corn stalks. It was a [fol. 359] foreign pattern, and the American company manufactured in Illinois.

Q. How long was he in that manufacturing business?

A. About four years.

Q. And prior to that?

A. Immediately—well, during the first World War he was in the aircraft business, and prior to that he was on the New York World.

Q. I see. The old Morning World, was it?

A. Yes, sir.

Q. Have you any knowledge of your husband's accounts in the public relations field, that is, generally speaking do they run to any one industry or——

A. Sir, his ethics are much like a lawyer's; he does not discuss his clients.

Q. So that you at least have not met, through your husband's clients or customers, any labor union officials, at any time?

A. No, sir.

Q. Have you served as a juror before, Mrs. Harding?

A. Yes, sir.

Q. Do you know of any reason why you could not be fair and impartial to both sides in this case?

A. No, sir.

Q. Have you served in a criminal case?

A. Yes, sir.

Q. And would you have any doubt as to your ability to remove prejudice or sympathy from your mind in arriving at a verdict?

A. I would have no difficulty, sir.

Q. And you haven't any prejudice at the present time?

A. No, sir.

Q. Have you read anything about the case?

A. No, sir. It is possible that I saw something about it in 1943, which I believe is the time indictments were returned, but I have read nothing about it since; and since the pink slip summons was delivered, the newspapers have been clipped, I have not read them.

[fol. 360] Q. And if you were convinced beyond a reasonable doubt that the testimony given by the witnesses in the case proved that these two defendants were guilty of the crimes charged in the indictment, beyond a reasonable doubt, you would not hestitate to convict them of those crimes?

A. It would be purely on the evidence, sir.

Q. And you wouldn't hesitate to convict——

A. No, sir.

Q. (Continuing)—if the evidence convinced you that they were guilty beyond a reasonable doubt?

A. No, sir.

Q. Now, has any question asked by Mr. Fitzsimmons or Mr. Polakoff or myself suggested an answer to you, as you heard it directed to another juror or prospective juror, that might be helpful in our ascertaining whether you should sit as a juror in this case?

A. I think you have asked all the questions, sir, except which newspapers I read.

Q. Well, you have told me that you haven't any opinion from any newspaper——

A. No, sir.

Q. (Continuing) —that you may read, that you can't set aside?

A. No, sir, no opinion.

Q. And, naturally, it is difficult for us to ascertain what has been going on in your mind; but, as you heard the questions, nothing was suggested to you that made it seem as

if you would be unable to serve fairly to both sides in this case?

A. No, sir.

Mr. Hogan: Thank you. No challenge.

Mr. Fitzsimmons:

Q. Mrs. Harding, you are down as a writer. What do you write? I mean, what did you write before you started [fol. 361] to do this very fine work?

A. Fifteen years ago as a newspaper reporter for a daily paper, morning paper, evening paper, and the Associated Press.

Q. What paper was that?

A. The Cleveland News and Cleveland Leader.

Q. So that I take it then you were a resident of the City of Cleveland for some time?

A. Yes, sir.

Q. How long have you been in New York?

A. Twenty-five years.

Q. And I did not hear what you said, if you did answer it, in answer to one of Mr. Hogan's questions about what papers you read. What papers do you read?

A. I read the Times, certain feaures in the Herald Tribune, the Wall Street Journal occasionally, and the Sun in the evening, and occasionally the Daily Worker.

Q. You don't know of any prejudice that might exist in your mind, as to either one of both of these defendants, if you were chosen here to serve?

A. None whatsoever.

Q. I suppose, if you were chosen as a juror and you heard all the facts, and the Judge gave you the law, I presume you will take the law from him, regardless of what you think the law is or should be; that is right, isn't it?

A. Yes, sir.

Q. Suppose a reasonable doubt exists in your mind as to the guilt of the defendants, would you hesitate in any way to vote for their acquittal?

A. I have no prejudices, and I wouldn't hesitate to vote for a verdict which corresponded to the charge of the Judge and to the evidence.

Mr. Fitzsimmons: No challenge for cause.

[fol. 362] Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: The juror is satisfactory to the defense.

(The taleswoman was accepted and sworn as Juror No. 8.)

The Clerk: Jurors, kindly answer and step forward as your names are called. Lawrence L. Oppenheimer, Henry L. deRham, Charles A. Livingston, Harry Norcross, Boris M. Volynsky, Murray W. Reddick.

(The above-named talesmen were then sworn collectively by the Court and thereafter examined:)

Lawrence L. Oppenheimer, a talesman, (residing at 230 Riverside Drive, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Oppenheimer, your occupation, sir?
A. Sales supervisor.
Q. For what company?
A. Philip Morris & Company.
Q. Cigarettes?
A. Yes, sir, and smoking tobaccos while they are scarce.
Q. You are still occupied?
A. The answer is yes.
Q. How long have you been with that company, sir?
A. 22 years.
Q. And do you know any of the persons whose names [fol. 363] have been read in this court-room?
A. I do not.
Q. Have you had dealings with any of the firms?
A. No, sir.
Q. Does any suggestion, or has any question given rise to a thought in your mind that might be helpful to Mr. Fitzsimmons, Mr. Polakoff or myself, in selecting a jury?
A. Well, just one thing, that I have had dealings with a union.
Q. A union?

A. My employees.

Q. Involving salesmen, is that it?

A. That is correct.

Q. And in that connection met union leaders?

A. Correct, sir.

Q. Have you had conversations with these union leaders, concerning the defendants in this case?

A. I have not.

Q. Have you read anything about this case?

A. Only recently.

Q. Has your reading caused you to form any opinion which would be prejudicial to the defendants in this case?

A. I don't believe so.

Q. Have you any doubt that you could set aside any opinion, favorable or unfavorable, and render a just verdict in this case?

A. I believe so.

Q. Well, is that, to repeat what we said before, an expression that you are using, or does it indicate that you have some doubt in your mind?

A. Well, not exactly because I am quite a follower of Westbrook Pegler, and I may be—my opinion may be a little biased in certain respects.

Q. You recall that you signed a questionnaire before you became a special juror?

A. Correct.

Q. You said at that time that you could put aside any opinion formed from hearsay evidence, such as newspaper [fol. 364] writing?

A. Well, since that time I happened to read that article on Monday.

Q. The article on Monday——

A. Yes, sir.

Q. That Mr. Fitzsimmons talked about?

A. That is correct.

Q. Well, you heard Mr. Fitzsimmons in connection with that, too, didn't you?

Mr. Fitzsimmons: No, he did not. I object to that. The juror was not here.

Mr. Hogan: Well, I asked the question, I am sorry. If he did not, then he did not.

A. I did not, sir.

Q. Well, did that leave an impression in your mind, which would make it difficult for you to sit in this case?

A. I must admit it has.

Mr. Hogan: I will consent to excuse the juror.

The Court: I will excuse him.

(Talesman excused by the Court.)

HENRY L. DERHAM, a talesman, (residing at 47 West 12th Street, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. deRham, do you know any of the persons whose names have been mentioned in this court-room?

A. No, sir.

Q. Have you had any dealings with any of the firms?

A. No, I have not.

Q. What is your occupation, Mr. deRham?

A. I am a marine underwriter.

[fol. 365] Q. With what company?

A. Chubb & Son.

Q. And so far as you know, your firm has not dealt with any of these companies that have been mentioned here?

A. As far as I know, they have not?

Q. Have you served as a juror before?

A. No, sir.

Q. Do you think that you can be just and impartial in this case if selected as a juror?

A. Yes, I do.

Q. And would you promise the attorneys for both the People and the defendants that you would base *for* verdict solely on the testimony in this case?

A. Yes.

Q. You wouldn't permit any prejudice, if it did arise in your mind, or any sympathy, to control or influence your verdict in any way?

A. No.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. deRham—that is the correct pronounciation, is it not?

A. Yes, sir.

Q. How long have you lived in New York?

A. Five years.

Q. And where were you born?

A. I was born in Cold Spring, New York.

Q. You are a college man, I take it?

A. Yes, sir.

Q. What college?

A. Harvard.

Q. Have you in the course of your work had occasion to deal with union leaders or representatives of labor?

A. Never.

Q. And in your work, I take it you do not come in contact with labor relations in any form?

A. No, sir.

[fol. 366] Q. Now, like all of us, through the years you have arrived at certain conclusions, and you have opinions on things that have to do with labor and labor leaders; that is right, isn't it?

A. Yes, sir.

Q. Now, would you say that as a result of those opinions or conclusions that you have arrived at, that there exists in your mind at the present time any prejudice that might keep you from giving a fair and impartial trial?

A. No, sir.

Q. To the two defendants?

A. No, sir.

Q. If you were chosen here would you accept the law entirely from his Honor, regardless of what you think the law is or should be in the circumstances?

A. Yes, sir.

Q. Would you accept nothing but the facts as the Court allows them in evidence from the mouths of witnesses?

A. Yes, sir.

Q. And base your verdict or judgment on what you have heard?

A. Yes, sir.

Q. Would you keep your mind free and open at all times until the case is finally given to you?

A. Yes, sir.

Q. And not discuss it or try to form any opinion beforehand as to what you might do as to either one or both defendants?

A. No, sir.

Q. Would you, after hearing all the evidence and taking the law from the Court as he gives it to you, if you have a reasonable doubt in your mind, hesitate to vote for the acquittal of these defendants?

A. No, sir.

Q. If such a doubt existed in your mind, from the evidence or from the lack of it?

A. No.

Mr. Fitzsimmons: Thank you. No challenge for cause.

[fol. 367] Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: The juror is satisfactory to the defense.

(The talesman was accepted and sworn as Juror No. 9.)

Charles A. Livingston, a talesman, (residing at the Winthrop Hotel, Lexington Avenue and 47th Street, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Livingston, what is your occupation?

A. I am in the advertising business.

Q. In business for yourself?

A. No. My brother and I control the advertising rights in the Fifth Avenue coaches.

Q. You furnish advertisements that are to be found in the Fifth Avenue Coach Company; is that it?

A. That is right.

Q. Solicit that business from the firms that advertise?

A. Yes.

Q. And how long have you and your brother been in that business?

A. Well, I have been with him for twenty years, and he has had that concession for thirty-five.

Q. Do you know any of the persons whose names have been mentioned in this case?

A. No, I do not.

Q. Have you had dealings with any of the companies?

A. No, I have not.

Q. Do you know of any reason why you could not be just [fol. 368] and impartial in this case, if selected as a juror?

A. No, I don't know of any reason. I have read Mr. Pegler's column for a great many years, and I admire him, but I don't think that I would allow his opinion to influence my judgment.

Q. It is his opinion and not your opinion, is that it?

A. That is the way I feel about it. I mean I——

Q. Have you read anything about this case?

A. Yes, I have read that article on——

Q. On Monday?

A. On Monday.

Q. Well, is there any opinion in your mind at this time, that you could not put aside, if selected as a juror in this case?

A. No, I don't think so.

Q. And you would promise, if selected as a juror, that you would not be influenced by any sympathy or prejudice of any kind?

A. I would, yes.

Q. And if the testimony and the evidence in the case convinced you beyond a reasonable doubt that these defendants were guilty of the crimes charged in the indictment you would convict them?

A. I would.

Q. If you had a reasonable doubt, after listening to the testimony—if there were still a reasonable doubt in your mind, why, of course, you would acquit?

A. That is right.

Q. You would be fair to both sides?

A. I would.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Livingston, you said you were an admirer of Mr. Pegler's?

A. I did say that, yes.

Q. You realize, of course, from reading his articles, that [fol. 369] he has—that he is at times very bitter, vitriolic——

A. That is right.

Q. (Continuing.) —unfair, indulges in name callings to people who have no redress and would not dignify them by replies?

Mr. Hogan: I object to the characterization of the writing.

A. Well, it is just a matter of opinion.

The Court: Just a moment.

The Witness: I am sorry.

Mr. Hogan: I object to the characterization of the writing. I think the only proper question is whether anything he has read, your Honor, has left him with any prejudice.

The Court: What was the question, please?

(The question was repeated by the stenographer.)

The Court: Of course, that is—I will overrule the objection. He may answer.

A. Well, I think it is just one of those things, it is a matter of opinion; you don't have to believe all that he writes.

Q. But he does——

A. That is why I say I am open-minded in the matter.

Q. But would you say that his writing at times was in bad taste?

Mr. Hogan: I object to that, your Honor.

The Court: Sustained.

[fol. 370] Q. Would you admire a man, as you said you have, who would blacken two citizens on the day their case is called for trial?

Mr. Hogan: This is argumentative.

The Court: Sustained.

Q. Do you admire Mr. Pegler's work?

A. Yes, I said that——

Mr. Hogan: I object to it as already answered.

Mr. Fitzsimmons: He said that on your examination, I think.

The Court: He said that.

Q. And you still so admire him now?

A. Yes, I admire the man, I admire his writings.

Q. And having that great admiration from his writings, you feel that they have left no effect on you whatsoever?

A. I would try not to let it influence my judgment.

The Court: Well, that is not the question.

By the Court:

Q. Have they had any effect on you?

A. No, I don't think that it would——

By Mr. Polakoff:

Q. Now, Mr. Livingston, you realize that both sides are trying to get a fair and impartial jury?

A. I understand.

Q. You realize, sir, do you not, that sometimes, with the best intentions of being fair, certain ingrained preju-
[fol. 371] dices occur within us, which we think we can lick, but in fact we can't. Now, do you agree with that policy?

A. I think I can lick it.

Q. You think you could lick it?

A. I can only say I think.

Q. You think you could give these defendants a fair and impartial trial, in spite of what you have read about them, written by Mr. Pegler?

A. I think I could.

Q. And you know Mr. Pegler has written about a lot of other things than this trial? You have read those articles too, haven't you?

A. I have read his column for many years.

Q. And he has written about these defendants a great deal?

A. Yes.

Q. Especially since they have been indicted, is that right?

A. That is right.

Q. In fact, he had taken credit on one or two occasions for causing the indictment, hasn't he?

A. That is right.

Mr. Hogan: I object to that, your Honor.

The Court: Sustained.

By the Court:

Q. Do you have any opinion at the present time as to the guilt or innocence of either of these defendants?

A. No, I have not. My mind is open.

Q. Your mind is open. In spite of your admiration for Mr. Pegler, would you be able to listen to the evidence in this case and then decide for yourself, in view of the evidence, on what you hear in court, without regard to any-
[fol. 372] thing that Mr. Pegler might have said in the past or may say in the future?

A. I think I could, your Honor.

Q. Well, are you sure of it?

A. Well, I am not sure.

The Court: All right, excused.

(Talesman excused by the Court.)

Harry Norcross, a talesman (residing at 44 Gramercy Park, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Norcross, have you read anything about this case?

A. No, I have not.

Q. You have no opinion then or impression that is prejudicial to the defendants or to the People?

A. No, I have not.

Q. There isn't any reason why you could not be just and impartial, if you are selected as a juror in this case?

A. No reason, no sir.

Q. Do you know either of the defendants?

A. No, I do not.

Q. As far as you are aware, do you know any friends of the defendants?

A. No, I don't know.

Q. Do you know anybody whose name was mentioned by any of the attorneys in this case?

A. I have heard the name of perhaps one or two of the contracting firms—the Walsh Construction Company.

Q. You mean the name is familiar to you?

A. Just familiar. The company I worked for, we—I think we, a few years ago, insured a project.

[fol. 373] Q. But you personally have not had any dealings?

A. No, sir.

Q. With any of the persons whose names have been mentioned?

A. No.

Q. And what is your company, sir?

A. I work for the James S. Kemper group of companies. It is a group of companies; Lumberman Mutual Casualty Company, American Motorist Insurance Company, and a few mutuals—mutual fire companies.

Q. And in what capacity do you serve?

A. I am manager of the underwriting department in New York City and vicinity.

Q. And how long have you served as manager of that department?

A. Well, I came here to take over this department May 1, 1942. I was transferred from Philadelphia, the Philadelphia office.

Q. And how long had you served the company in Philadelphia?

A. I came with them November 1, 1928.

Q. Were you born in Pennsylvania?

A. No, I was born in New Jersey. I came from Virginia. I worked down in Virginia before I——

Q. Did you go to school in New Jersey?

A. No; I went to school in Rhode Island.

Q. You have been—made the circuit?

A. Yes.

Q. Does your work for this insurance company bring you into contact with labor union leaders at all?

A. No; I have no contact with them. We deal through brokers and agents.

Q. You do not come in direct contact with the policy holders?

A. No, we do not see them. Once in awhile we may, but it is only when a broker, an agent, probably would want to bring one in for some reason. I can't think of any reason now.

[fol. 374] Q. Have you served as a juror during your residence in Philadelphia?

A. No; I have never been called before.

Q. Have you served in the two years that you have been in New York?

A. I was called as a special juror last year.

Q. Did you serve?

A. No; I wasn't chosen.

Q. And you are certain that if selected as a juror in this case you can base your verdict solely on the testimony as given by the witnesses in this case?

A. Yes, sir, I could.

Q. And you wouldn't permit sympathy or prejudice to influence that verdict in any way?

A. No, sir.

Mr. Hogan: Thank you. No challenge for cause.

By Mr. Polakoff:

Q. Mr. Norcoss, you haven't read sufficiently about this case to cause you to form any opinion one way or the other?

A. No, I haven't read anything about the case. I may have, several years ago, but I can't remember.

Q. It left no impression?

A. No impression, no, sir.

Q. And if it did, it was purely incidental and you have forgotten it?

A. Yes.

Q. Have you served on civil juries before?

A. Never served on a jury.

Q. Have you heard the questions during this day and yesterday put by Mr. Hogan, Mr. Fitzsimmons and myself, concerning the rules governing criminal trials?

A. Yes, sir.

Q. The presumption of innocence, reasonable doubt—are you prepared to follow the law as given to you by the Judge, [fol. 375] and judge the evidence from the testimony of the witnesses on the stand?

A. Yes, sir.

Q. Do you know of any reason why you could not give either side a fair and impartial trial?

A. No, I do not.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Polakoff: Acceptable.

(The talesman was accepted and sworn as Juror No. 10.)

Boris M. Volynsky, a talesman, (residing at 441 West End Avenue, Manhattan, New York), was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Volynsky, do I pronounce that correctly, sir?
A. That is right, sir.
Q. What is your occupation?
A. I am a builder of machine tools.
Q. How long have you been in that business?
A. Oh, about twelve years.
Q. Do you have your own shop?
A. Yes, sir.
Q. Is that located in New York County?
A. Yes, sir.
Q. And were you in that general line prior to 12 years ago?
A. At that time I was in the exporting of machinery.
Q. And what is the name of your present company?
A. It is under my own name, Volynsky Manufacturing Company, and I also have an export company, South Atlantic Trading Corporation, who export industrial equipment.
[fol. 376] Q. And where is the plant?
A. 311 West 66th Street.
Q. How many persons do you employ?
A. About 25.
Q. And then is there a separate personnel for the importing company?
A. Yes, sir.
Q. How many do you employ there?
A. A small office, about three engineers.
Q. And the 25 at the plant are machinists?
A. That is right.
Q. Toolmakers, are they?
A. That is right.
Q. They belong to unions, do they?
A. Yes, sir.
Q. And have you negotiated with labor union leaders?
A. Yes, sir.
Q. As a result of your dealings with them, have you any opinion at the present time that would be prejudicial to the People or to the defendants in this case?
A. No, sir.
Q. Have you read anything about this case?

A. I did.

Q. Has that formed any opinion in your mind, which would be prejudicial to either side in this case?

A. No, sir.

Q. Do you know of any reason why you could not be fair and impartial in this case?

A. No, sir.

Q. Have you served as a juror before, Mr. Volynsky?

A. No, sir.

Q. And not as a civil—not in a civil case?

A. No, sir.

Q. Or a criminal case?

A. No, sir.

Q. How long have you been in New York City?

A. Over 20 years, with certain intervals. Since 1933 I am—the last time—that is about 12 years now.

Q. Have you been called before as a special juror?

[fol. 377] A. Yes, but I have been excused in each case, due to the work that I was doing; with the exception of the last time, I was excused due to my casual acquaintance with the Assistant District Attorney who was prosecuting the case.

Q. What Assistant District Attorney was that?

A. Mr. Grumet.

Q. How well do you know Mr. Grumet?

A. Oh, I just met him at one time. As a matter of fact, I did not recognize him, either did he recognize me, until he started to question me.

Q. Are you doing any work for the United States Government at this time?

A. Yes, exclusively for the United States Government.

Q. War contracts exclusively?

A. That is right.

Q. Would your service here in any way impair that usefulness to the Government?

A. Considerably.

Q. I beg your pardon?

A. Yes, considerably. I just received a contract this morning that will require my personal attention; it is very urgent work.

Q. A contract for machine tools?

A. No, for certain parts for commercial service.

The Court: By consent may he be excused?
Mr. Fitzsimmons: Yes.
The Court: Excused by consent.

(Talesman excused by consent.)

[fol. 378] MURRILL W. REDDICK, residing at 161 West 10th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Reddick, do you know any of the persons whose names have been mentioned here?
A. No.
Q. You are not acquainted with the defendants?
A. No, sir.
Q. So far as you know, you don't know any friends of the defendants?
A. No, sir.
Q. Have you had dealings with any of the companies, the names of which were mentioned here?
A. No, sir.
Q. What is your occupation?
A. Salesman.
Q. For what type of work?
A. Charles F. Hubbs, Paper.
Q. And where is that company, Charles F. Hubbs Company?
A. 389 Lafayette Street, New York City.
Q. How long have you been employed as a salesman for Hubbs & Company?
A. About 22 years.
Q. And what type of establishments do you sell to, Mr. Reddick?
A. Well, at the present time we are all in war work now, selling plants package materials for Overseas shipments.
Q. Selling twine and paper?
A. Well, not much twine; mostly waterproof papers and anti-corrosive, greaseproof papers for special packages, to prevent corrosion and rust, and so on and so forth.
Q. Are any of these materials manufactured by your company?

A. No. We don't manufacture any. We are distributors.

Q. Wholesalers, is that it?

A. Yes.

[fol. 379] Q. And most of the material that you get hold of at this time, you sell to the Government, is that it?

A. Well, we sell either to the Government or to Government contracts. In other words, we have to have Government contract numbers to release the material. We sell a great deal of it, too, not necessarily to the Government itself, but to firms who have war contracts.

Q. And how long had that been true, for the last three or four years?

A. Since the war started.

Q. And prior to that, what were the establishments you dealt with?

A. Well, we sell a general line of wrapping papers, twines, toilet paper, tissue paper, and things of that nature.

Q. Stationery stores?

A. No, not stationery stores. Wholesaling.

Q. To wholesalers?

A. We sell to firms who use paper for packing materials.

Q. Do you have any dealings with labor union officials in that connection?

A. Not personally, no.

Q. Your duties with the firm don't bring you in contact with labor union officials that the firm might deal with?

A. No.

Q. Have you served as a juror before?

A. Yes, sir.

Q. In criminal trials?

A. Yes.

Q. Then you know the procedure. Is there anything about this case, as you have been able to ascertain its implications in the few days you have sat here that would make it impossible for you to sit as a juror and be fair to both sides?

A. Why, we had labor trouble up at our place here a few years ago, and it has left me with a little bias, as far as [fol. 380] certain tactics that are employed by certain unions, especially the one that we were connected with.

Q. What one was that?

A. Well, I don't know what the number of it is. It is the Truck Drivers Union. Our men were not members of the union, but were being paid the union scale——

The Court: Oh, we don't want the details.

Q. Is this a bias that is in your mind at the present time?

A. Yes, sir.

Q. And you would have difficulty removing that bias, and it might be detrimental to the interests of the defendants? Is that what you are telling us?

A. Why——

The Court: Excused.

(Talesman excused.)

(The Court then duly admonished the jurors and the prospective jurors according to law, whereupon a recess was taken until 10:00 A. M., Friday, March 2, 1945.)

(Bail continued for both defendants.)

[fol. 381] Room 1530,

Criminals Courts Building,

New York, N. Y.,

Friday, March 2, 1945

(Trial continued pursuant to adjournment.)

The Clerk of the Court: Jurors, kindly answer and step forward as your names are called:

Robert S. Plowman, Jr.
George T. Rayner.
Robert B. Brown.
Harry F. Littlejohn.
Joseph Wanderstock.
Bertram A. Mayer.

(The respective talesmen were then sworn collectively by the Court, and thereafter examined:)

Robert S. Plowman, Jr., residing at 108 West 227th Street, New York City, a talesman, having been previously

duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Plowman, you have heard all or most of the questions asked of the other jurors?

A. I have heard them all.

Q. Do you know of any reason why you couldn't be fair and impartial in this case?

A. There is no reason.

Q. Do you know of any friends of the defendants?

A. I do not.

Q. Do you know any officials of the companies, the names of which were mentioned?

A. No, sir.

[fol. 382] Q. Never had dealings with any of the companies?

A. No, sir.

Q. Have you served as a juror before, Mr. Plowman?

A. Yes, sir.

Q. And there isn't anything about this case, the nature of the case, the personalities of the defendants, anything else that has been suggested by questions, that would in your mind make it difficult for you to sit and be fair in this case?

A. No, sir.

Q. And you could render a verdict solely on the testimony without permitting prejudice or sympathy to influence that verdict in any way?

A. I could.

Mr. Hogan: No challenge.

Q. I am sorry. I didn't get from you your occupation?

A. I am with the U. S. Steel.

Q. And in what capacity?

A. In the transfer department, stock transfer.

Q. How long have you been in the transfer department?

A. 38 years.

Q. And that involves the recording of stock transfers?

A. Transfers of stocks, dividends and so forth.

Q. And so far as you know, you haven't had any dealings with the stock of the companies, the construction companies mentioned?

A. No. That is just Steel stock.
Q. That is simply United States Steel stock?
A. That is r' t.

By Mr. Polakoff:

Q. Mr. Plowman, have you any fixed principles or ideas concerning labor, that might prejudice you in this case?
A. I have none.
[fol. 383] Q. For or against the defendants?
A. No, I haven't.
Q. In spite of the fact that your company has had considerable labor negotiations and experiences, your mind is open on that score?
A. It is.
Q. You have sat as a juror, a special juror, before, haven't you?
A. Yes, sir.
Q. You served in a case in 1940?
A. About that time, yes.
Q. That wasn't a murder case, was it?
A. No, I don't think so.
Q. You are familiar, then, with the rules of criminal evidence and of criminal procedure?
A. I am.
Q. Questions about which you have heard both Mr. Hogan and defense counsel put to the former prospective jurors?
A. Yes, sir.
Q. Would you give the defendant the benefit of a reasonable doubt, if such a doubt existed?
A. In my mind I would, yes.
Q. Do you start with an open mind, and a presumption that the defendant is innocent of the crime charged?
A. I do.
Q. Do you know of any reason why you couldn't sit as an impartial juror?
A. There is no reason.

Mr. Polakoff: Challenged.
Mr. Hogan: The juror is satisfactory.
The Court: Challenged by the defendants.

(Talesman excused.)

[fol. 384] GEORGE T. RAYNER, residing at 309 East 48th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Rayner, what is your occupation?

A. I am a teller with the Bankers Trust Company; securities teller.

Q. How long have you worked as a teller in that bank?

A. Twelve years.

Q. Do you know of any reason why you couldn't be impartial in this case?

A. I know of no reason.

Q. Have you read anything about the case?

A. Only in the last three days.

Q. Has your reading left you with any opinion that would be prejudicial to either side in the case?

A. No, it has not.

Q. Do you know any of the persons whose names were called out in the court room?

A. No one.

Q. Have you had dealings in your banking work with any of the companies, the names of which were mentioned?

A. No.

Q. Have you sat as a juror before?

A. Never.

Q. As some of the rules have been given out, incorporated in questions, do you think you could follow those rules—that is, the presumption of innocence——

A. I could.

Q. And the burden that is on the People of establishing the guilt of the defendant. You would have no difficulty in following those rules?

A. No.

Q. And you wouldn't permit prejudice or sympathy to influence your verdict in any way?

A. No, I would not.

[fol. 385] Q. You would base your verdict solely on the testimony, as obtained from the witnesses in the case?

A. On the evidence.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Rayner, how long have you been in your present employment?

A. Twelve years.

Q. Prior to that?

A. Other bank positions.

Q. You are a college graduate?

A. No. I attended college.

Q. Have you any fixed opinions concerning labor, organized labor?

A. No. I have no prejudices. Opinions, but no prejudices.

Q. Are your opinions *that* such that would influence you either way, for or against?

A. They wouldn't influence me in this case.

Q. Have you read about this case?

A. Only in the past three or four days.

Q. Has your reading been such that it would cause you to form an opinion either way?

A. No. Not influenced me, not at all.

Q. Have you sat before as a special juror?

A. No.

Q. Have you sat before as a regular juror?

A. No, not at all.

Q. This is your first experience?

A. Yes.

Q. As a juror, have you heard the questions put by both sides to the former prospective jurors, concerning the rules and the procedure in criminal cases?

A. Yes.

Q. And without repeating them, would you give the defendant the benefit of a reasonable doubt?

A. I would.

Q. And start out with the presumption that he is innocent?

A. Yes.

[fol. 386] Q. You are aware of the fact that the indictment is not to be given any weight whatsoever, or consideration in this case?

A. I understand that.

Q. It is merely an accusation, a method of bringing the defendant to trial. Do you know of any reason which would

prevent you from giving either side a fair and impartial trial?

A. No.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: May I ask one or two questions?

By Mr. Fitzsimmons:

Q. Mr. Rayner, you are a college man, are you?

A. I attended Columbia University. I didn't graduate. I worked in the extension courses there after business hours.

Q. Oh. You didn't know Mr. Hogan up at Columbia, did you?

A. No, I did not.

Q. Have you ever had any experience in dealing with labor leaders or labor unions?

A. No. We have a union in the bank but it applies only to the armed guards and messenger boys. Our employees have never been solicited to join any union, outside of that.

Q. You would not be eligible for membership in that particular union, would you?

A. No, I would not.

Q. Did you ever apply for membership to a union?

A. No.

Q. Did you ever have any experience with a union or labor leaders?

A. No.

Q. On anything that might be considered labor, that left [fol. 387] in your mind a feeling of prejudice against these men who are to go on trial?

A. No. I have had no experience with organization labor in any way.

Q. What afternoon paper do you read?

A. I read the Sun.

Q. You have read nothing about this case except what you read in the last few days?

A. Only in the past few days.

Q. What you read in the last few days, has that left any impression with you that might create in your mind a prejudice against the defendants?

A. No. It has left no impression at all.

Mr. Fitzsimmons: Thank you, sir. Peremptorily challenged.

(Talesman excused.)

ROBERT B. BROWN, residing at 515 East 39th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Brown, your business is what?

A. I am assistant vice-president of Bristol Myers Company.

Q. Advertising?

A. Primarily, but also public relations.

Q. Do you know any of the persons whose names have been mentioned here?

A. No, I do not.

Q. Have you had dealings in your capacity with your [fol. 388] company, with any of the construction companies?

A. No, I have not. None of those mentioned.

Q. How long have you been with that company?

A. Nine years.

Q. Prior to that?

A. I was with an advertising agency.

Q. In New York City?

A. New York City, yes.

Q. Do you know of any reason why you couldn't be just and impartial to both sides in this case?

A. I believe I could be. I have opinions, but no prejudices.

Q. Well, have you read anything about this case?

A. I have.

Q. And did you form an opinion that would be prejudicial to either side?

A. I formed an opinion, but I don't know that it would be prejudicial if I were selected.

Q. We have got to be certain about that. Can you tell us emphatically, that your opinion, whatever it is, would not influence you either slightly one way or the other?

A. No. I cannot say that.

Mr. Hogan: We will excuse you.

Mr. Fitzsimmons: Consented.

The Court: We will excuse him.
Mr. Hogan: That will be by consent?
Mr. Fitzsimmons: We consent.

(Talesman excused.)

[fol. 389] HARRY F. LITTLEJOHN, residing at 33 Fifth Avenue, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Littlejohn, tell us your occupation?
A. In the commercial banking business.
Q. And what is the bank?
A. New York Trust Company.
Q. And how long have you been with the New York Trust Company?
A. About nine years.
Q. And prior to that in the same field?
A. Yes.
Q. Do you know any of the companies, the names of which were mentioned in the court room here?
A. No, I do not.
Q. Do you know any of the persons whose names were mentioned?
A. No, I do not.
Q. You don't know, so far as you are aware, any friends of the defendants?
A. I do not.
Q. Have you read anything about this case, sir?
A. Yes, sir.
Q. Have you formed any opinion?
A. No, sir.
Q. So that you could sit and be fair and impartial to both sides?
A. I think so, sir.
Q. Have you served as a juror before?
A. Yes, sir.
Q. And you could take the law in this case, as you have taken it in other cases, as given by his Honor, and follow closely the instructions with respect to the law?
A. Yes, sir.

Q. And you could decide this case without permitting prejudice or sympathy to influence your verdict in any way?

A. Yes, sir. I would like to say that the first person that was examined yesterday morning is an associate of mine, a trust officer of our company, and he explained at that [fol. 390] time that our company acts in a fiduciary capacity for certain individuals, which are owners of one of the companies whose name has been mentioned, and also that I believe that my company does have accounts with some of Mr. Kaiser's companies.

Q. Have you had any personal dealings with any of the officials, the names of whom were read out by Mr. Fitzsimmons?

A. I have not.

Q. So that it wouldn't be embarrassing in any respect to you to sit in a case which involved the companies, as it has been explained here by Mr. Fitzsimmons, Mr. Polakoff and myself?

A. No.

Q. That wouldn't influence your verdict in any way as to the guilt or innocence of these two defendants, would it?

A. No, sir.

By Mr. Fitzsimmons:

Q. Who was the gentleman who was in your company, who answered the questions?

A. Jim Ewart, one of our trust officers, James H. M. Edwart.

Q. Was Mr. Edwart excused by the Court, or what?

A. He was excused by the Court, it is my recollection.

Q. And what company is it that has a trust account in the bank?

A. None of the companies that I know of. It is the family of one of the owners of one of these companies.

Q. You mean Stirling Tomkins, connected with the New York Trap Rock, is that the matter that came up?

A. I am not familiar with it myself, except as what Mr. Ewart explained. I think he mentioned that it was the family of, I think it was David Small.

[fol. 391] Q. Oh, the family of David Small?

A. That is my recollection, but I have no personal knowledge of it.

Q. And he has at your bank an established trust, and that trust's affairs are handled by your bank on behalf of the Small family?

A. I don't know anything about it except what Mr. Ewart testified to.

Q. In other words, that is the first time it was called to your attention, as far as it relates to this case?

A. That is correct.

Q. Now, Mr. Small's name is one of the names included in the indictment, and he does happen to be a prospective witness. After all, I don't know who is going to appear in behalf of the People. That is Mr. Hogan's case. But his name is mentioned in the indictment, assuming from what you heard Mr. Ewart answer yesterday in relation to this account down at the bank, and any acquaintances that Mr. Ewart might have with him, and considering you don't know Mr. Small but that you are associated with the New York Trust Company, and assuming further that if you were to sit here as a juror in this case and you were to pass on the credibility of this Mr. Small, in relation to the guilt or innocence of either or both of these defendants, wouldn't that seem to you that that might place you in an embarrassing position?

A. It might.

Q. I am only asking you now to really get down to the bottom.

A. Yes. Well, I am secretary of our company, and naturally, in that capacity, I do——

The Court: You want to challenge him for cause?

[fol. 392] Mr. Fitzsimmons: Yes.

The Court: Yes. I will excuse him.

(Talesman excused.)

JOSEPH WANDERSTOCK, residing at 80 Riverside Drive, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Wanderstock, do you know any of the persons whose names were called out?

A. No, sir.

Q. Have you had dealings with any of the firms?
A. No.
Q. What is your business, sir?
A. Real estate.
Q. How long have you been in the real estate business?
A. 25 years.
Q. Where is your office?
A. 147 West 25th Street.
Q. 147 West 25th. Is that your own business?
A. Yes.
Q. How many persons are associated with you in it?
A. By myself.
Q. By yourself. Is it the management of buildings?
A. No management.
Q. Brokerage?
A. That is right, buying and selling.
Q. Have you served as a juror before?
A. I did.
Q. Do you know of any reason why you couldn't serve in this case and be fair and impartial to both sides?
A. I don't know of any reason.
[fol. 393] Q. You haven't any prejudice against the law that is being invoked here, extortion?
A. No, I have not.
Q. So far as you are aware, you have no acquaintance with any friends of the defendants?
A. No, sir.
Q. You could be just and impartial to both sides, and base your verdict simply on the testimony in the case?
A. I can.
Q. Did you serve as a special juror in the case against Buchhalter?
A. I did.
Q. Do you recall me from that case?
A. I was the juror who took sick *and* third or fourth day and I couldn't finish.
Q. You were the alternate juror who took sick?
A. That is right. I was taken to the hospital.
Q. That was after four days of the trial?
A. I believe it was the fourth or fifth day.
Q. Your health, I hope, is improved?
A. Yes. I am all right.
Q. You have no doubt you could, if selected, serve as a juror in this case?

A. Yes, I could.

Q. Even if it were prolonged?

A. Yes. I had preconceived, that is all.

Q. I see. There isn't any reason then that you know of?

A. Not that I [illegible] off.

Q. In fairness to both sides, that you couldn't sit and serve in this case?

A. No.

By Mr. Polakoff:

Q. You have been in the real estate business for about 25 years?

A. That is right.

Q. You operate real estate or——

A. What do you mean by operating?

Q. I mean, do you manage properties?

A. No.

[fol. 394] Q. Just a broker?

A. Well, buying on my own and selling.

Q. I see. You have owned real estate, of course?

A. That is right.

Q. And as an owner of real estate, you have come in contact with labor unions, have you not?

A. I didn't have that type of real estate. Mine was mostly store property.

Q. I see. Have you any fixed opinions concerning organized labor or its representatives? You can answer that yes or no.

A. Well, like every other adult, I have opinions, of course.

Q. Are those opinions such that they would cause you to form a prejudice against these defendants?

A. None whatsoever.

Q. You are familiar with the rules of criminal evidence, are you not?

A. I am.

Q. You are positive, though, that in spite of your real estate operations, that you have had no contact with labor unions whatsoever?

A. None whatsoever.

Q. Where do you live, sir?

A. 80 Riverside Drive.

Q. Have you heard of this case before you were called as a prospective juror?

A. Only faintly, I have a sort of a hazy idea, but that is about all.

Q. Nothing that you heard or read about this case has caused you to form any impression of the guilt of innocence of the defendants?

A. No. None whatsoever.

Q. You could start this trial with a fair and open mind?

A. Yes.

Q. Fair to both sides?

A. I could.

Q. Do you know of any reason why you couldn't sit as a fair juror?

A. I don't know.

[fol. 395] Q. Your health is all right at the present time?

A. Fair.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The People will excuse Mr. Wanderstock.

(Talesman excused.)

Bertram A. Mayer, residing at 15 East 36th Street, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Mayer, what is your occupation?

A. I am in charge of the sales for Ruby Bags.

Q. Hand bags?

A. Hand bags, that is all we manufacture.

Q. And where is the business office?

A. The New York office is 180 Madison Avenue.

Q. And the plant where they are made?

A. Our plant is at Union City, New Jersey.

Q. How long have you been connected with the company?

A. Thirteen years.

Q. Do you have occasion to go to the plant in Jersey City?

A. Yes, I do.

Q. How long have you lived in New York City, Mr. Mayer?

A. Well, I have lived in New York City seven years and previous to that I lived in Westchester for nine, I was born here and lived the rest of the time in New York.

Q. Do you have many friends in New Jersey?
A. No, I don't.
Q. Do you know the defendants in this case?
A. No, sir.
[fol. 396] Q. Ever met either one of them before?
A. No.
Q. So far as you are aware, you don't know any friends of the defendants?
A. No.
Q. Have you had any dealings with any of the companies whose names have been mentioned?
A. No.
Q. Do you know any of the officials named by Mr. Fitzsimmons?
A. No.
Q. Have you read about this case, Mr. Mayer?
A. Yes.
Q. At the time of the indictment?
A. Yes.
Q. And in recent days?
A. Yes.
Q. Has your reading, or any conversations you may have had with respect to that, left you with any opinion as to the guilt or innocence of these defendants?
A. Well, I have opinions on labor, because I have had a lot of contact with labor.
Q. Well, we will get to that in due time. But I wish an answer to my question. Do you have an opinion with respect to the guilt or innocence of these defendants as a result of your reading or conversations?
A. No. I wouldn't say that, no.
Q. Now, you are sales manager, is that right?
A. That is right. Well, I am in charge of sales. It is a small company.
Q. Do you in that capacity have dealings with labor union leaders?
A. Well, I have sat in on all the conferences we have had, and we usually sign a new contract every two years, so I have really had some dealings with them.
Q. In addition to direct dealings you have heard of other dealings that your company has had with labor union officials?
A. True; that is right.

[fol. 397] Q. And have those meetings or discussions left you with any opinion that would be prejudicial to the defendants in this case?

A. I believe so.

Mr. Hogan: I consent to his being excused.

The Court: Excused.

(*Talesman excused.*)

The Clerk of the Court: Jurors, kindly answer and step forward as your names are called.

Shelby A. Mathews.
Victor H. Scales.
Norman S. McMillan.
Bernard J. Geis.
Philip F. Brady.
Alfred R. Heath.

(The respective talesmen were then sworn collectively by the Court, and thereafter examined.)

SHELBY A. MATHEWS, residing at 307 West 87th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Mathews, what is your occupation?

A. Investments.

Q. How long have you been in the investment field?

A. Oh, about since 1930.

Q. And prior to that?

A. Well, I was a salesman.

[fol. 398] Q. Salesman for what company?

A. A number of them, but the last was David H. Zell.

Q. Now, in the last 14 years, 15 years, in which you have been in the investment field, what company have you been associated with?

A. None. For myself.

Q. Where is your office?

A. I have none. My home.

Q. You invest for others or just your own?

A. Myself.

Q. Do you know any of the persons whose names have been mentioned in this case?

A. No, sir.

Q. And do you have any dealings with any of the firms?

A. No, sir.

Q. Do you know of any reason why you couldn't sit and render an impartial verdict in this case?

A. No, sir.

Q. You served as a juror before?

A. Yes, sir.

Q. You have heard the questions asked by all of the attorneys?

A. Yes, sir.

Q. Nothing occurred to you as you heard those questions, that you think that you want to volunteer at this time?

A. No.

Q. To assist any counsel?

A. No.

Q. Have you read about the case?

A. Recently.

Q. Did your reading cause you to form any opinion which might be prejudicial to either side?

A. No prejudicial opinion.

Q. Well, do you have any opinion with respect to any facet of this case, that would be prejudicial to either side?

A. No.

Q. Well, does your hesitation in answering indicate you are turning over a doubt in your mind? Be frank with us. If you have a doubt I wish you would express it.

A. It is very vague.

[fol. 399] Q. Well, see if you can make it clear——

The Court: Excused.

The Talesman: Thank you.

(Talesman excused.)

Victor H. Scales, residing at 50 East 10th Street, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Scales, do you know any of the persons whose names were mentioned in court?

A. No, sir.

Q. Have you had dealings with any of the companies?

A. No, sir.

Q. What is your occupation?

A. Public relations counsel.

Q. And with what company?

A. Myself.

Q. And how long have you been serving in that capacity?

A. Oh, I have been in the public relations field about 20 years. I have had my own organization about five.

Q. Where is your office, sir?

A. 51 East 10th Street.

Q. Do you have clients in the fields of industry or business which would make it difficult or embarrassing for you to sit in this case?

A. In a rather strange way, yes. I would be very glad to explain that if you will permit me.

Q. All right.

A. One of my undertaking- is as a general manager of a war relief organization, which receives rather substantial contributions from both labor union-, that is both the over- [fol. 400] all labor unions. In that capacity I am frequently in contact with some of the leaders of the—what might be called the organized union movement.

I have another interesting situation which I think should be pertinent; as a public relations counsel I am interested in the development of the union movement and the way it is working out in this company. While I have made no analysis of this case and have done no extensive reading on it, yet I am frequently called upon to discuss with my clients, and with other public relations people, some of the aspects of what we might call difficulties that do arise in the progress of the movement.

Q. I think you have explained it sufficiently so that I can ask you the one question that I am permitted to ask, and that is: Would you have an opinion that might work to the prejudice of either side in this case?

A. Yes, sir. Very definitely.

The Court: Excused.

Mr. Hogan: Thank you for your frankness.

(Talesman excused.)

NORMAN S. MCMILLIAN, residing at 33 Fifth Avenue, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. McMillan, will you give us your occupation, please?
A. I am a stock broker.
Q. And associated with what firms?
A. Green, Ellis & Anderson.
[fol. 401] Q. And how long have you been with Green, Ellis & Anderson?
A. About 20 years.
Q. In the sales end?
A. In the sales end, yes.
Q. Have you had dealings with any of the men whose names have been mentioned here?
A. None that I know of.
Q. Have you had any dealings with any of the companies?
A. I have not.
Q. You don't know any of the defendants?
A. I do not.
Q. So far as you are aware you don't know friends of the defendants?
A. That is right.
Q. How long have you lived in New York City?
—. Approximately 20 years.
Q. Have you served as a juror before?
A. I have.
Q. In a criminal case?
A. In a criminal case.
Q. Do you know of any reason why you couldn't be fair and impartial in this case?
A. I know of no reason.
Q. And you could without hesitation base your verdict solely on the testimony as it is given by the witnesses in the case?
A. I believe so.
Q. Have you read about the the case?
A. I have. I think it is only fair to state that I read Mr. Westbrook Pegler regularly over a period of years I think I have read most of the articles in regard to the defendants.

Q. You appreciate that there is a vast difference between what appears in Mr. Pegler's column and what is testified to under oath on the stand, do you not?

A. That is correct.

Q. And that is hearsay; Mr. Pegler wasn't present during these matters, so that it would have to be so regarded. Now, let me put it positively: Can you set aside any impression or opinion that may linger in your mind as the [fol. 402] result of your reading of Mr. Pegler's column?

A. I believe I can.

Q. Do you have any doubt about it?

A. Well, I think it is only fair to say that over a period of time I have acquired an impression that because neither one of the defendants has answered these accusations in any way through a libel suit or otherwise——

Q. You can't go into that.

The Court: I think I will excuse the juror.

(Talesman excused.)

Bernard J. Geis, residing at 2 Sutton Place South, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Geis, do you reside in New York County?

A. Yes, sir.

Q. How many months of the year?

A. All year.

Q. Now, there is information at the Commissioner of Jurors—I am sorry. We have two persons with your name on our list. One is marked Plainfield, New Jersey. I take it all back. How long have you lived in New York City?

A. Four years.

Q. And prior to that?

A. I lived in Chicago.

Q. What is your occupation, Mr. Geis?

A. I am a member of the editorial staff of the Grosset & Dunlap Publishing Company.

[fol. 403] Q. As I recall it, that is fiction and non-fiction; all types of books?

A. Yes, sir.

Q. How long have you been with Grosset & Dunlop?

A. Only a month.

Q. Prior to that?

A. I was a member of the editorial staff of Coronet and Esquire Magazines.

Q. How long were you with Coronet and Esquire?

A. Twelve years.

Q. What company publishes those magazines?

A. Esquire, Inc.

Q. I see. Did you serve with that company in Chicago?

A. Yes, sir.

Q. Were you born in Illinois?

A. I was born there.

Q. Do you know any of the persons whose names have been mentioned in this case?

A. No, sir.

Q. Have you had dealings with any of the companies whose names have been mentioned here?

A. No, sir.

Q. Are you in the—when you were with Coronet and Esquire, did you make contributions to the magazines? Were you on the writing end?

A. No. I did very little writing. In fact, virtually none; purely editorial work.

Q. Do you know of any reason why you couldn't sit as a juror in this case and be just and impartial to both sides?

A. No, sir.

Q. Have you read about the case?

A. I read an item in Tuesday's paper.

Q. Did that leave you with any opinion as to the guilt or innocence of the defendants?

A. No.

Q. You reserved your judgment?

A. Yes, sir.

Q. And you could do that until the end of the case, and [fol. 404] until after his Honor has charged, if you were selected as a juror?

A. Yes.

Q. You do promise that you wouldn't permit prejudice or sympathy to influence your verdict in any way?

A. Yes.

Q. Is there anything that occurs to you, that you think defense counsel or I should know, with respect to your availability as a juror?

A. No, sir.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Geis, can you unequivocally tell me that anything you read has not in any way formed any opinion or prejudice in your mind, that might keep you from serving, if you were chosen as a juror—that is, keep you from giving the defendants a fair and impartial trial?

A. Yes.

Q. In other words, you would enter here with an open mind?

A. Yes, sir.

Q. Now, in your experience have you ever been in contact with or have you had any business dealings with labor union representatives, or with unions generally?

A. No.

Q. Your business doesn't take you into that field?

A. No, it doesn't.

Q. Have you ever done any writing in which you discussed union or union leaders?

A. No, I haven't.

Q. You never expressed any opinion about this case, have you?

A. No, I haven't.

Q. Have you ever acted as a complainant in a criminal case against anyone?

A. No.

Q. You said you were born in Chicago?

A. Yes, I was.

[fol. 405] Q. How long have you resided in New York?

A. Four years.

Q. If you were chosen in this case, would you accept the law from his Honor, regardless of how you feel the law is or should be?

A. I would.

Q. Would you exclude everything from your mind in the consideration of this case except the facts as they were given to you by the witnesses in court?

A. Yes.

Q. You are a college man, I take it?
A. Yes, I am.
Q. And what college?
A. Northwestern University.
Q. That is located in the City of Chicago?
A. In Evanston.
Q. Right outside Chicago?
A. Yes.

Mr. Fitzsimmons: No challenge for cause.
Mr. Hogan: We will excuse the juror.

(Talesman excused.)

PHILIP F. BRADY, residing at 103 Vermilyea Avenue, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Brady, do you know any of the persons whose names were mentioned here?
A. No, I do not.
Q. You haven't had dealings with any of the companies?
A. No, sir.
[fol. 406] Q. So far — you know, you haven't friends who are friends of the defendants?
A. No.
Q. Where are you employed, sir?
A. Consolidated Edison, as an electrical foreman.
Q. Electrical foreman?
A. Yes.
Q. Are you a member of the Electricians' Union?
A. No. I am not eligible, but I used to belong to it.
Q. As a foreman you would not be eligible?
A. That is right.
Q. And how long were you a member of it, Mr. Brady?
A. Several years.
Q. How long have you been with the Consolidated Edison?
A. 24 years.
Q. Have you read anything about this case?
A. I think I have read something about it, but I have formed no opinion.

Q. And do you know of any reason why you couldn't serve as a juror in this case, and be fair and impartial to both sides?

A. No.

Q. You have heard all the questions?

A. Yes.

Q. I take it if anything did occur to you during the period of questioning, you would make a notice to tell it to us in time?

A. Yes.

Q. Nothing has occurred to you?

A. No.

Q. You served as a juror before?

A. Yes.

Q. In criminal cases?

A. Yes.

Q. So that you know what the experience is. And bearing that in mind, do you think you could decide this case solely on the testimony, as it is obtained from the witnesses in the case?

A. Yes.

Q. You wouldn't permit sympathy or prejudices to influence your verdict in any way?

A. No.

Mr. Hogan: Thank you, Mr. Brady.

[fol. 407] By Mr. Fitzsimmons:

Q. Have you served as a special juror prior to your call here?

A. No, sir.

Q. Murder case?

A. Yes.

Q. Were you born in New York, sir?

A. I was born in Delhi, New York. That is in New York State.

Q. Delaware County?

A. That is right.

Q. What union did you say you did belong to?

A. Two of them. The Brotherhood of Electrical Workers and the Brotherhood of Consolidated Edison Employees.

Q. Which one did you belong to first, the first one you mentioned?

A. That is right.

Q. Local 3?

A. Well, affiliated with that.

Q. Then you became a foreman and you became ineligible for membership.

A. That is right.

Q. Now, can you unequivocally tell me that anything that you read about this case has not formed in your mind any opinion that would create a prejudice against these defendants receiving a fair and impartial trial?

A. I do.

Q. You can say that without fear or hesitation at all?

A. Yes.

Q. Is that right?

A. That is right.

Q. Have you ever discussed this case with anyone?

A. No.

Q. I mean in the past; not recently; say at the time you read about the indictment back in 1943.

A. No, I didn't.

Q. So hence it follows you gave no opinion of your own about it?

A. That is right.

Q. You haven't at the present time any opinion in your mind as to the guilt or innocence of these defendants?

A. No. I don't know nothing about it.

[fol. 408] Q. What kind of work do you do for the Consolidated Edison?

A. I am electrical foreman at the Sherman Creek Power station.

Q. That is that big power plant up around Dyckman Street?

A. That is right.

Q. On the banks of the Harlem there?

A. That is right.

Q. You have been with the company, I take it, for a great number of years?

A. Twenty-four.

Q. You are married, I see from your history, and have got four children?

A. Yes.

Q. Do any of your children work for the Edison Company?

A. No. Two daughters are married. One works at the American District Telegraph——

Q. You don't have to tell me. How about the sons?

A. No sons. I'm lucky.

Q. Have you ever been a complainant in a criminal case?

A. No.

Q. Did you ever serve as a grand juror?

A. No.

Q. If you were chosen in this case, would you accept the law from his Honor?

A. I would.

Q. Regardless of what you think the law is or should be?

A. Yes.

Q. Would you put out of your mind any experiences you might have had in other criminal cases, as far as bringing into this case anything that applied to the prior cases that you served on?

A. Yes.

Q. Would you exclude from your mind anything but the facts you have heard testified to in this court, from the mouths of the witnesses who were brought here?

A. Yes.

Q. Is that right?

A. Yes.

[fol. 409] Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: We will excuse Mr. Brady.

(Talesman excused.)

Alfred R. Heath, residing at 1239 Madison Avenue, New York City, a talesman, having been previously duly sworn, was examined on the voir dire and testified as follows:

By Mr. Hogan:

Q. Mr. Heath, do you know any of the persons whose names were mentioned?

A. I do not.

Q. Have you had dealings with any of the companies?

A. I have not.

Q. What is your occupation, sir?

A. Executive assistant, New York Steam Corporation, which is one of the system companies of the Consolidated Edison Company.

Q. It is associated with the Consolidated Edison?

A. It is one of the system companies, yes.

Q. How long have you been with the New York Steam Corporation?

A. 15 years.

Q. Prior to that?

A. With an affiliate of the Consolidated Edison Company for about 15 years.

Q. Has your training been that of an engineer?

A. Yes.

Q. You don't know any of the officials of these construction companies, I believe their names were mentioned by Mr. Fitzsimmons; you haven't come in contact with them?

A. I do not, no.

Q. Have you served as a juror before?

A. Yes, I have.

Q. Do you think you could give a fair and impartial verdict in this case?

A. I do.

[fol. 410] Q. Do you think you could exclude all prejudice and sympathy from your mind in reaching a verdict?

A. I do.

Mr. Hogan: Thank you.

By Mr. Fitzsimmons:

Q. How long did you say you had been with the New York Steam, Mr. Heath?

A. About 15 years.

Q. And are you an officer of the New York Steam Company?

A. Executive assistant.

Q. And how long have you held that position?

A. About the same length of time.

Q. In your work with the New York Steam, do you come in contact with labor leaders or labor unions?

A. With the business manager of the local of the union.

Q. What union is that?

A. The Brotherhood of Consolidated Edison System Employees, Local 3.

Q. It is quite a long name.

A. Well——

Q. What is his name, by the way?

A. Arthur Haggerty.

Q. Is he an employee of the New York Edison Company?

A. New York Steam.

Q. Consolidated Edison or New York Steam?

A. New York Steam Corporation.

Q. Would you say that the New York Steam was an affiliate or subsidiary of the Edison?

A. Well, it is a subsidiary of the Edison.

Q. What newspapers do you read, sir, evening papers?

A. Sun; Journal.

Q. How much have you read about this case in the past; much or little?

A. Beg pardon?

Q. Have you read much or little about the defendants in this case, in the past?

[fol. 411] A. I haven't read about this case except the past two or three days.

Q. As a result of what you read in the last two or three days, you haven't formed any opinion of any kind, have you?

A. No.

Q. Did you ever deal with any other labor leaders or any other unions except the one, the name of which you gave me a moment ago?

A. No.

Q. You are a civil engineer, is that right?

A. I was graduated as an electrical engineer. Most of my work has been commercial engineering with the utilities.

Mr. Polakoff: May I ask him a question, your Honor?

The Court: Certainly.

By Mr. Polakoff:

Q. You have been a member of the Federal Grand Jury?

A. I have.

Q. And has such service as a grand juror caused you to form any opinion of the guilt or innocence of a person charged with crime by the grand jury?

A. No.

Q. You have absolutely no feeling that the person against whom the grand jury has filed an indictment may be guilty or might be guilty of the crime charged?

A. No.

Mr. Hogan: I object to that, your Honor. There is always a possibility he may be guilty.

The Court: He has answered "no".

Mr. Polakoff: That is why I changed it.

Q. Have you any idea that he is guilty as charged?

[fol. 412] Mr. Hogan: I object to that, your Honor—"Have you any idea that he is guilty."

The Court: Yes, that is not quite correct in form, but he can answer it if he wants to.

Q. When a person is charged by a grand jury have you any belief that such a person is guilty of the crime charged?

Mr. Hogan: I object to the form of the question, your Honor.

The Court: Sustained.

Q. Has your service as a member of the grand jury caused you to form any opinion as to the guilt or innocence of a person charged by the grand jury with a crime?

Mr. Hogan: I still think it is objectionable.

The Court: Overruled.

A. Well, it would make me feel that there were good grounds for them. Naturally, that the man might be guilty. I would be open minded as far as sitting on a jury.

Q. No, I am just trying to get what is in your mind and make sure that there is nothing in your mind that might prejudice you even unconsciously against a person charged with a crime. Now, I have had some experience and I know that as a grand juror you have filed indictments against persons charged with a crime. Now, has that service left any feeling with you?

A. Not my service as a grand juror, no.

Q. Even though you sat as a grand juror, are you per-[fol. 413] fectly able to start out in listening to a criminal trial with the belief that the defendant is presumed to be innocent of the crime charged by the grand jury?

A. Yes.

Q. You realize that only one side is presented to the grand jury, is that right?

A. I do.

Q. And although you served as a grand juror, you feel that if selected as a juror in this case, you can start out with a free and impartial mind and have no prejudices and opinions, however slight, against the defendant in this case?

A. I can.

Q. When did you serve as a grand juror last?

A. About a year and a half ago.

Q. Federal grand jury?

A. Yes.

Q. You served for a full month?

A. Yes.

Q. And during that month, the grand jury of course filed a great number of indictments?

A. Quite a few.

Q. Have you served prior to that as a grand juror?

A. No.

Q. Have you served as a special juror?

A. No. I was called a year ago on this panel, but I wasn't called to the stand to qualify.

Q. Have you ever served as a juror in a criminal case?

A. No.

Q. Have you ever served as a juror in civil cases?

A. I have, in Nassau County.

Q. How long have you lived in New York City?

A. Intermittently, ten years.

Q. When was the last time that you lived outside of New York City?

A. Lived in Nassau County about three and a half, four years ago.

Q. And you served in criminal cases as a juror in Nassau County?

A. No.

Q. Civil cases?

A. Yes.

Q. Can you as a juror start out with the presumption that [fol. 414] the defendants, although charged by the grand jury with a crime, are presumed to be innocent?

A. I can.

Q. And that they are entitled to the benefit of a reasonable doubt?

A. Yes.

Q. And if you had a reasonable doubt you would give the defendants the benefit of that doubt?

A. I would.

Q. Do you know of any reason why you couldn't give either side a fair and impartial trial of this case?

A. I do not.

Q. Have you been a party to any labor negotiations?

A. No. I have known of the negotiations that have gone on in our company, but I haven't been a party to them.

Q. Have you any fixed opinions concerning labor and its representatives?

Mr. Hogan: I object to that, your Honor, unless he adds "prejudicial."

Mr. Polakoff: I first have to find out whether he has opinions.

The Court: Overruled. You may answer.

A. Not that would be prejudicial, no.

Mr. Polakoff: He has answered the next question. No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: May I ask one or two more questions?

By Mr. Fitzsimmons:

Q. Are you in any way related to former Supreme Court Justice Riley Heath?

A. No.

[fol. 415] Q. How long have you lived in New York, sir?

A. Intermittently for ten years.

Q. Where were you born?

A. Boston.

Q. Thank you.

Mr. Fitzsimmons: Peremptorily challenged by the defense.

(Talesman excused.)

The Court: We are about to take a short recess. The jurors will please not discuss the case or permit anyone to discuss it in their presence or form any opinion about it.

(Whereupon a short recess was taken, after which the trial was resumed.)

The Clerk: Jurors, kindly answer and step forward as your names are called. Charles E. Seitman, Samuel C. Goodrich, Samuel A. Anthony, Jr., Thomas S. Anderson, James M. Geraghty, Bertrand P. English.

(The above-named talesmen were then sworn collectively by the Court, and thereafter examined.)

CHARLES E. SEITMAN, a talesman, residing at 315 West 86th Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Seitman, what is your occupation, sir?

A. Salesman.

[fol. 416] Q. And with what company?

A. Radio station WHN.

Q. How long have you been with Radio Station WHN?

A. Two years.

Q. And prior to that?

A. I was with the World, New York American—newspaper advertising salesman.

Q. And with newspapers for some years prior to your connection with WHN?

A. Yes, that is right—20-odd years.

Q. But always in the business end, that is, the advertising end?

A. Yes, always in the business end.

Q. Do you know any of the persons whose names were mentioned?

A. I do not.

Q. Have you had dealings with any of the companies?

A. I have not.

Q. You do not know the defendants?

A. No.

Q. You never met them, so far as you know?

A. Definitely not.

Q. So far as you are aware, you haven't met any friends of the defendant?

A. Correct.

Q. Have you had any conversations with respect to the defendants with anybody?

A. I have not.

Q. Have you read anything in reference to this case?

A. Within the last several days.

Q. Has it left you with any opinion that would be prejudicial to either side in this case?

A. No, sir, it has not.

Q. Have you served as a juror at any time?

A. I have.

Q. In criminal cases?

A. Yes.

Q. Do you know of any reason why you could not serve in this case and be fair and impartial?

A. Yes, I do know.

Q. I beg your pardon?

A. I do know of a reason.

[fol. 417] Q. Well, you had better tell it to us.

A. Very briefly, six years ago I put out a special edition for publishers of a labor newspaper. That is my reason.

Q. So that, without characterizing your feelings in the matter, you do have a strong opinion one way or the other; is that it?

A. I do not. I merely stated the facts, so that you could evaluate them.

Q. Oh, I see. Well, does it constitute a reason then why you think it would be difficult or embarrassing for you to sit in the case?

A. I believe it would. I would lean backward.

The Court: Excused.

Mr. Hogan: Well, we don't want any leaning in any direction.

(Talesman excused by the Court.)

Samuel C. Goodrich, a talesman, residing at 66 West 55th Street, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Goodrich, what is your occupation?

A. I was with G. Schirmer, music publishers, and now secretary of a small school for theatre arts.

Q. Will you name the company again?

A. G. Schirmer, Inc., music publishers.

Q. And how long were you with G. Schirmer, Inc.?
A. Seven years.
Q. What years were they?
A. To September this year.
Q. And in September of this year, will you tell me again what you changed to?
[fol. 418] A. I left, to become secretary for a small school for the theatre arts.
Q. What is the name of that school?
A. Younger People's theatre.
Q. And where is it located?
A. 154 West 56th Street, New York City.
Q. Is it more or less of a school for——
A. It is a small, private school, yes.
Q. (Continuing:) —for persons who aspire to the stage?
A. That is right, sir.
Q. Does it take in arts other than the theatre?
A. None other.
Q. What type of work did you do with the publishing house, the music publishing house?
A. At Schirmer's I traveled for them in the Educational Department, and then I became retail store manager for two years.
Q. And the travelling was in a sales connection?
A. Yes.
Q. All over the United States?
A. Yes, sir.
Q. Do you know of any reason why you could not sit in this case?
A. No, sir.
Q. As a juror, and be fair and impartial?
A. No.
Q. Do you know any of the persons whose names were called out?
A. None, sir.
Q. Have you had dealings with any of the companies?
A. No.
Q. Have you served as a juror before?
A. Never served. Called twice, but not selected.
Q. And that goes for civil cases, too?
A. Yes, sir.
Q. How old are you?
A. Thirty-four.
Q. How long have you been in New York City?

A. Since 1932.

Q. And prior to that?

A. New Haven, attending school, and I come from Newburgh, New York.

[fol. 419] Graduate of Yale?

A. Yes, and high school previous to that.

Q. Have you read anything about this case?

A. Just since Monday, sir.

Q. You haven't any opinion—any opinion that would be prejudicial to either side?

A. None that would be prejudicial, no.

Q. And irrespective of your reading, have you any opinion that might work to the disadvantage of either side, with respect to what is apt to be the——

A. I can say, none that would be prejudicial either way.

Q. Do you think that you could render a verdict, without permitting prejudice or sympathy to influence that verdict in any way?

A. Yes, sir.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. I take it that you had never been a complainant in any criminal case?

A. Never, sir.

K. Have you ever served as a grand juror?

A. No, sir.

Q. Never served as a juror on a special panel, before this call; is that so?

A. Called twice, but not selected on either.

Q. And your reading since Monday about this case left no prejudicial opinion in your mind, that would act unfavorably against either one of these defendants?

A. I saw nothing, sir.

Q. Assuming that you were drawn in this case, would you cast aside any ideas of what the law is, and take it exactly as his Honor gives it to you, to be applied to the facts in this case?

A. That is my duty, sir, and I could do it.

[fol. 420] Q. And if selected, would you exclude from your judgment and consideration in this case everything but the facts as you hear them in this court room?

A. Yes.

Q. In your career, have you ever had any dealings with labor unions or labor officials?

A. No, sir, none at all.

Q. Have you ever expressed any opinion concerning—on those subjects, to anyone?

A. Casual, minor—nothing major.

Q. Nothing that would act in a prejudicial way?

A. No, sir. I have none.

Q. To bar your serving faithfully in this case, if chosen?

A. None, sir.

Q. Is there anything else—about yourself, that I have not asked directly, that you would like to volunteer, so that you might aid me in making up my mind as to whether to accept or reject you?

A. No, sir.

Mr. Fitzsimmons: Thank you. No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: The juror is acceptable to the defense.

(The talesman was accepted and sworn as Juror No. 11.)

[fol. 421] SAMUEL A. ANTHONY, JR., a talesman, residing at 26 East 35th Street, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Anthony, what is your business?

A. Advertising sales.

Q. And your office address is——

A. 475 Fifth Avenue.

Q. How long have you been in the advertising sales?

A. About fifteen years.

Q. Will you describe that business just a little bit for me?

A. We represent a number of companies who manufacture displays for national advertisers.

Q. Window displays?

A. Window displays—counter and window.

Q. And prior to going into that field 15 years ago, what did you do?

A. Insurance sales.

Q. In New York City?

A. Pennsylvania, New York City, and Syracuse.

Q. What companies?

A. Improved risk mutuals.

Q. What type of insurance did they——

A. Factory, fire.

Q. How long have you been in New York City, sir?

A. About eight years, I believe.

Q. And prior to that?

A. Philadelphia.

Q. Your present company has an office in Philadelphia?

A. No. It is a personal business.

Q. Do you know of any reason why you should not be fair and impartial in this case?

A. No.

Q. Have you read about the case at all?

A. Oh, I have glanced at the articles that have appeared in the Sun and the Times.

Q. You haven't any opinion that would be prejudicial to either side?

A. No.

[fol. 422] Q. Do you know any of of the persons whose names were mentioned?

A. No.

Q. Your answer would be the same with respect to the companies?

A. Right.

Q. Have you served as a juror?

A. Yes.

Q. At any time? In criminal cases?

A. Murder cases.

Q. Do you recall the rules of law which govern us? You haven't any quarrel with those? You would have no difficulty accepting the law as his Honor charges?

A. No.

Q. And could you, if selected as a juror in this case, render a verdict based solely on the testimony as given by the witnesses?

A. Yes.

Q. You would not permit sympathy or prejudice to influence that verdict in anywise?

A. No.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Anthony, how long have you had your offices at 475 Fifth Avenue.

A. About two and one-half years, I think.

Q. I have had my offices in that building for 19 years. We have never met, have we?

A. Not to my knowledge.

Q. Have you any fixed ideas concerning labor, organized labor, or its representatives, which might cause you to have a prejudice against the defendants in this case?

A. No.

Q. Prior to your present occupation, what was your business.

A. Insurance.

Q. For how long?

A. Oh, about four years, I believe.

Q. New York City?

[fol. 423] A. Well, I was in New York City, I was in Syracuse, and down in Pennsylvania.

Q. Continuously back how long have you been in business in New York City?

A. About eight years.

Q. Prior to that? In Syracuse?

A. Philadelphia.

Q. You have served once as a special juror?

A. Right.

Q. In a murder case. Have you had any other experience as a juror?

A. A Federal Grand Jury, about a year and a half ago.

Q. You have served as a Federal Grand Juror?

A. Yes.

Q. Has your service as a Federal Grand Juror caused you to have any impression as to the guilt or innocence of the defendant charged by the Grand Jury with a crime? Answer that yes or no.

A. No.

Q. Even though you have served as a Grand Juror, you feel you could, if selected as a juror in this case, start with a firm and honest belief that the defendant is presumed to be innocent of the crime charged?

A. I could.

Q. I may say that the rules of criminal evidence provide that a defendant is presumed to be innocent, and the People

must prove him guilty beyond a reasonable doubt; and even though you have served as a Federal grand juror, you feel that you can give the defendants the benefit of a reasonable doubt, if one exists?

A. I can.

Q. What education have you had, sir?

A. High School.

Q. Syracuse?

A. No. Scattered around the country.

Q. Have you ever heard of this case, prior to your being [fol. 424] called as a juror?

A. I probably noticed it in the paper, but paid not much attention to it.

Q. Has what you have read caused you to form any impression as to the guilt or innocence of the defendants?

A. I haven't had much time for reading, to make any impressions.

Q. Has anyone ever discussed this case with you?

A. No.

Q. Do you know of any reason, that I may not have inquired about, which would prevent you from giving either side a fair and impartial trial?

A. No.

Q. Do you know of any facts, concerning which either side may not have inquired, which you feel in fairness we ought to know, so that we can make up our minds as to whether or not to select you as a juror?

A. No.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The juror is acceptable.

Mr. Fitzsimmons: Peremptorily challenged.

(Talesman excused.)

Thomas S. Anderson, a talesman, residing at 255 West 84th Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Anderson, do you know of any reason why you could not be fair and impartial in this case?

A. No, I don't.

Q. Do you know any of the persons whose names have been called?

A. No.

[fol. 425] The Court: He has a bad cold. I will say, for both counsel's benefit. Perhaps you will consent that he be excused.

Mr. Fitzsimmons: Whatever you say.

The Court: You may be excused, Mr. Anderson.

(Talesman excused by the Court.)

James M. Geraghty, a talesman residing at 31 East 12th Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Geraghty, your occupation is what?

A. I am art editor of the New Yorker Magazine.

Q. How long have you been with the New Yorker?

A. About six years.

Q. And prior to that?

A. I was with McGraw-Hill Book Company.

Q. In a similar capacity?

A. No.

Q. What did you do for McGraw-Hill?

A. I was in the business department—credit, collections—manager of the department.

Q. And how long have you lived in New York City?

A. Since 1929. Two years I lived in New Jersey, but continued to work in New York.

Q. Where in New Jersey?

A. River Edge.

Q. I don't know where that is, River Edge.

A. It is north of Hackensack.

Q. Do you know any of the persons whose names have been mentioned in this case?

A. No, I do not.

Q. Have you had any dealings at any time with any of the firms.

[fol. 426] A. Well, my brother is employed by a firm called Kaiser Walsh in San Francisco. I don't know if it is the same. I imagine it is, however,—shipbuilders.

Q. Yes. They have a shipyard in Rhode Island also.
A. Providence, Rhode Island, I think.
Q. That is the same firm. Would that fact make it difficult for you to sit as a juror in this case?
A. No, not that fact.
Q. Have you read anything about this case, Mr. Geraghty?
A. Yes, I have read a good deal about it.
Q. Has your reading or any conversations that you may have had with anybody, including your brother——
A. Well, I haven't.
Q. You haven't spoken to him?
A. No.
Q. Has your reading——
A. I think my reading has.
Q. It has left you with any opinions?
A. Left me with opinions, yes.
Q. Would that opinion—without telling us which way it veers your mind—be prejudicial to either side in this case?
A. I am afraid it is definitely prejudicial.

The Court: Excused.

(Talesman excused by the Court.)

Bertrand P. English, a talesman, residing at 15 West 11th Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. English, what is your business?
A. I am in women's hats.
[fol. 427] Q. And how long have you been in the millinery business, about?
A. Many, many years.
Q. And where are you located?
A. In New York City. I am at present serving in the capacity as sales and merchandise manager.
Q. Is this a manufacturing company?
A. Wholesale.
Q. Wholesale?
A. And distribution.
Q. Do you know any of the persons whose names were read out?

A. No, I do not.

Q. And are you familiar with any of the firms?

A. No, I am not.

Q. And do you know of any reason why you could not be just and impartial in this case?

A. I am afraid I could not be very—I could not be impartial.

Q. You have an opinion which you could not set aside?

A. Yes.

The Court: Excused.

(Talesman excused by the Court.)

The Court: Draw one. Just one. One at a time now.

The Clerk: Jurors, kindly answer and step forward as your names are called. John A. Morgan.

JOHN A. MORGAN, a talesman, residing at 25 Fifth Avenue, Manhattan, New York, was duly sworn by the Court, and examined on the voir dire as follows:

Mr. Hogan:

Q. Mr. Morgan, what is your occupation?

I. I am employed by the Guaranty Trust Company of New York.

[fol. 428] Q. And how long have you been with the Guaranty Trust Company?

A. Since 1938. A former period of 12 years with the same company.

Q. And what was the interval between the former period and the period beginning in 1938?

A. Chiefly in banking in North Ca.olina and with the Federal Government.

Q. How long was the interval?

A. Eight years.

Q. And in what capacity do you serve the Guaranty? What is your work?

A. I write analyses, reports, and editorial comment on general business conditions, for publication by the Trust Company.

Q. And does that appear in a letter or brochure sent out by the Guaranty Trust Company to its depositors?

A. Chiefly a monthly magazine published by the company.

Q. And was it work similar to that which engaged you during your first period of service with the Guaranty?

A. A variety of financial research, chiefly in connection with quotations of securities and this general analytical work for publication, in the early years as well.

Q. And what type of work did you do in North Carolina during the eight years that you were separated from the Guaranty?

A. I was a vice-president of a bank, serving as an investment officer in the Trust Department.

Q. Then you spoke of a period of service with the Federal Government. What type of work was that?

A. I was senior economist in the Public Works Administration.

Q. Has that been your training, that of an economist?

A. Yes; I have had a good many years of academic training.

Q. Do you know any of the persons whose names have [fol. 429] been mentioned in this courtroom?

A. No, I do not.

Q. Have you had any dealings with, or have you written about, any of the companies, the names of which have been mentioned in the courtroom?

A. No, no. This work that I mentioned has to do with general business conditions, not with individual companies.

Q. You never write any articles about heavy construction or——

A. No.

Q. Or have you friends in that field, of any kind?

A. No, I don't know any.

Q. So far as you are aware, you don't know any friends of the defendants?

A. No, I am not aware of it.

Q. Do you know of any reason why you could not sit as a juror in this case, if selected, and be fair and impartial to both sides?

A. I am not aware of any such reason.

Q. Have you read anything at all about this case, Mr. Morgan?

A. Not beyond the headlines, and only those this week. I did not go beyond the headlines, when I knew that it was identifiable.

Q. And the headlines left you with no opinion that would be prejudicial to either side in this case?

A. Oh, no, no.

Q. Have you served as a juror before?

A. Yes. Not in this locality.

Q. In a criminal case?

A. Yes.

Q. Do you believe that you could render your verdict in this case, based solely on the testimony as given by witnesses as called to the stand?

A. I do.

Q. And you wouldn't permit prejudice or sympathy to influence that verdict in any way?

A. I would not.

[fol. 430] Q. And if you believed these defendants guilty beyond a reasonable doubt, by virtue of the testimony given in this case, you would not hesitate to convict them?

A. I would not.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. You say you write a monthly letter, sir, in your present position with the Guaranty Trust Company?

A. I do chiefly—that is the principal part of my work, writing the business comment that appears in the Guaranty Survey, a monthly letter published by the bank.

Q. The name of the letter is the Guaranty Survey?

A. The Guaranty Survey.

Q. And that is published once a month?

A. Once a month.

Q. And is distributed where?

A. Oh, it has a wide circulation, all over the country.

Q. Subscribed to by those interested, or sent gratuitously?

A. Just sent gratuitously.

Q. To the customers of the bank, for the most part, and investors and the like?

A. Yes.

Q. Has there been, in the recent past, any articles written by you, concerning labor or anything having to do with labor, in the Guaranty Survey?

A. No. There would only be such a mention as a strike or some such matter of general interest, as, for instance,

the coal strike and its economic effects. Nothing beyond that.

Q. Do these writings pretend to predict what may happen as a result of strikes to come, or strikes that are existing at the present time; or do they just report them, as to what effect it might have on general business conditions? Is that what you are trying to tell me?

A. Surely. No, no prediction; just merely an ordinary [fol. 431] business analysis of that, as among other various factors in business.

Q. How far have you gone, in writing articles concerning strikes or walkouts, lockouts, picket lines, and things—similiar types of matters?

A. Well, I don't know how to say—only that the general statement that a strike occurred or did not occur, or that the strike had been settled.

Q. Would you give an opinion as to whether the strike was just or not?

A. Oh, certainly not.

Q. No. Would you pass an opinion, in your writings, about the leaders of the strike or leaders of the union that were engaged in the strike?

A. No. That would not be within our province; we would not presume to go into that field.

Q. I am not trying to annoy you.

A. That is all right.

Q. I just want to get your trend of thought here, that is all.

A. That is all right.

Q. You said to Mr. Hogan that you had prior jury service in the State of North Carolina; is that right?

A. Yes, and in New Jersey.

Q. Where in New Jersey did you serve?

A. Newark.

Q. Did you live in Newark—I presume you must have——

A. In East Orange.

Q. Oh, you lived in East Orange and you served in Essex County?

A. Yes.

Q. How long did you serve, or how long did you live over in East Orange?

A. Six years.

Q. How long have you presently lived in New York?

A. Six years.

Q. Did you move from East Orange to New York?

A. No; I came from North Carolina to New York, the last time.

Q. You realize that the laws pertaining to criminal law [fol. 432] are different slightly in some respects, greatly in other respects, as the States differ one from the other? You realize that?

A. Yes.

Q. And if you were chosen in this case, would you accept the law from his Honor, regardless of what you think the law is or should be?

A. Certainly.

Q. You wouldn't try to parallel anything that took place in North Carolina, due to one of your experiences there, with what is happening here today, would you?

A. Not at all.

Q. You would cast that aside. Now, what afternoon papers do you read?

A. Sun and Telegram.

Q. And all you read about the defendants in this case were headlines, and most of those this week; is that right?

A. All of them this week. I had never heard of the case until I had the jury notice.

Q. Never heard of the case and never heard of the defendants?

A. No.

Q. Never read anything about them?

A. I don't recall it, if I did.

Q. It certainly, therefore, has not left any opinion or prejudice in your mind, which would work unfavorably towards them; is that right?

A. Not at all. I know of no opinion.

Q. Have you ever been a complainant in a criminal case?

A. No.

Q. And have you done any grand jury service, either here or in North Carolina?

A. No.

Q. How many times have you served in North Carolina as a juror?

A. Once.

Q. How many times in Newark?

A. Once.

Q. Both times in criminal cases?
A. One, I think in Newark, it was a civil case.
[fol. 433] Mr. Polakoff: May I ask one question, your Honor?

By Mr. Polakoff:

Q. Mr. Morgan, I just would like to know whether you have any opinions concerning labor or its representatives, which would cause you to be unfavorable either to the defendants or to the People in this case?
A. None whatever.
Q. You have no prejudices for or—no prejudice against against labor, have you?
A. Oh, no.

Mr. Fitzsimmons: No challenge for cause.
Mr. Hogan: The juror is satisfactory to the People.
Mr. Fitzsimmons: Satisfactory to the defense.

(The talesman was accepted and sworn as Juror No. 12.)

The Court: Swear the whole panel now.

(The jury of twelve was thereupon duly sworn by the Court.)

The Court: In the opinion of the Court, it is advisable we have alternate jurors, and the Court directs the drawing of two alternate jurors.
The Clerk: Jurors, kindly answer and step forward as their names are called. James E. Morrow, Augustus E. Lewis, Vincent M. Sozzi, Arthur S. Sherwin, Mildred Simon, John W. Witherington.

(The above named talesman were then sworn collectively by the Court, and thereafter examined.)

[fol. 434] James E. Morrow, a talesman residing at 227 East 57th Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Morrow, with what company are you associated?
A. I am not employed.
Q. And your last employment was with what company?
A. Machinery Builders, Incorporated, Long Island City.

Q. How long had you been with the Machinery Builders, Incorporated?

A. Four years.

Q. And what years were they, Mr. Morrow?

A. 1940 to 1944.

Q. And before 1940 what was your employment?

A. With the Moth Aircraft Corporation.

Q. And how long with the Moth Aircraft?

A. I was promoter of that company; I was with them two years.

Q. And where were you employed six years ago?

A. I wasn't employed. I was doing financial work for myself.

Q. Has your training been that of an engineer?

A. Industrial financing.

Q. Has your training been engineering?

A. I am an aeronautical and mechanical engineer.

Q. How long have you been in New York City?

A. Twenty years.

Q. Do you know the defendants in this case?

A. I do not.

Q. Have you had any dealings with any of the companies, the names of which have been mentioned?

A. With the Kaiser Shipbuilding Corporation, is all.

Q. How long ago was that?

A. About a year ago.

Q. Do you know any of the officials of any of the companies?

A. No, I do not.

[fol. 435] Q. Have you served as a juror before?

A. Yes, I have.

Q. In criminal cases?

A. In General Sessions, regular.

Q. Do you know of any reason why you could not be fair and impartial in this case?

A. I think that my record with the Labor Relations—National Labor Relations Board and the War Labor Board, would prevent me from serving.

Q. Prevent you from serving?

A. I say, my record with the National Labor Relations Board and the War Labor Board would prevent me from serving.

Q. Is it the record that would prevent you, or that you have an opinion, as the result of dealings with the——

A. No,—my record with them, in opposition to union activities.

Mr. Hogan: Oh, I see. All right.

The Court: Excused.

(Talesman excused by the Court.)

Augustus E. Lewis, a talesman, residing at 540 Park Avenue, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Lewis, do you know of any reason why you could not sit as a juror in this case?

A. Why, yes. I have certain, very definite views as regards labor.

Q. You are not able to set aside those views?

A. Which I really feel I am not able to set aside.

The Court: Excused.

(Talesman excused by the Court.)

[fol. 436] Vincent M. Sozzi, a talesman, residing at 66 East 83rd Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Sozzi, what is your occupation?

A. I own real estate. Some of it is garage buildings, some loft buildings, and some office buildings.

Q. And do you have a real estate office?

A. No; I have a general office, just for myself.

Q. And this has taken up your time for some years—the management of your own properties?

A. Fourteen years.

Q. Prior to that were you also in the real estate field?

A. No; I was assistant sales manager, group division, Metropolitan Life Insurance.

Q. And what type of building is it that you own?

A. Two of them are garages, one is an apartment house, two are loft buildings, one is a—well, I guess it is a loft building, too, storage warehouse.

Q. Do you know any of the persons whose names have been mentioned here?

A. No, sir.

Q. Have you had dealings with any of the companies?

A. No, sir.

Q. Have you read anything about the case?

A. Oh, yes.

Q. Have you any opinion, as a result of your reading, which you think might be prejudicial to either side?

A. No, I don't think so, but perhaps it would help you and save sometime—in 1929—1939, 1940, 1941, I was administrator of the garage industry in New York City, which required that I settle the disputes between labor and industry. And three years prior to that I was the industry rep- [fol. 437] resentative in writing up the contracts for the following years.

Q. Well, was that service such that you believe it would be embarrassing or difficult for you to serve?

A. No.

Q. In other words, that you give us as information with respect to your own activity?

A. That is right.

Q. But your work at that time left you with no impression or opinion, which you would carry into this jury box, and which might be prejudicial to the defendants or to the People?

A. None. As a matter of fact, the very nature of the job required——

Q. That you be impartial?

A. That I be impartial.

Q. And you are still impartial?

A. Oh, yes.

Q. And can be impartial, if selected as a juror?

A. Yes.

Q. And would you render a verdict exclusively on the testimony of the witnesses?

A. Yes, sir.

Q. And you could promise the attorneys for the defendants and myself that you would not permit sympathy or prejudice to influence your verdict in any way?

A. That is right.

Q. And if you believed that the testimony proved the defendants guilty beyond a reasonable doubt of the crimes charged in the indictment, you would convict them?

A. Yes, sir.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Your office is at 654 Madison Avenue?

A. That is right.

[fol. 438] Q. How long have you been there?

A. Two years, I think.

Q. You never met me, did you?

A. No.

Q. My office happens to be in the same building.

A. That is very funny.

Q. I have been there for a longer period——

A. I congratulate you. It is a good choice. It is a good building.

Q. We both agree.

A. Yes.

Q. Now, you told Mr. Hogan that you were the impartial arbitrator for the disputes in the garage industry in New York City?

A. That is right.

Q. For a time back in 1939, 1940 and 1941?

A. That is right.

Q. And were you the sole arbitrator?

A. No; there were two other arbitrators. I was the chairman.

Q. Three sat at a time?

A. Three sat at the joint bar.

Q. And over a period of three years you heard approximately how many disputes?

A. I don't know—50, 100, 200.

Q. And at most of those hearings before your Board, would the disputes concern themselves with management on one side and labor on the other?

A. That is right.

Q. In almost every instance?

A. Almost every instance, yes.

Q. So that there was on the Board, I presume, a representative of labor, and a representative of industry, and you were the Impartial Chairman?

A. That is right.

Q. And as a result of that experience, you, of course, have a very great and general knowledge of how disputes arise in that industry; is that correct?

A. Oh, I have some knowledge.

[fol. 439] Q. And do you know what the viewpoints of both management and labor have been, as far as those disputes were concerned?

A. That is right.

Q. That have been before you. And you are certain, in telling us that as a result of that experience and having sat as Impartial Chairman over that period of time, that nothing that took place or happened would in any way leave a feeling or register something in your mind that might at this time act as a prejudice against either one or both of these defendants?

A. No, none.

Q. In other words, you could divorce the idea entirely from your mind that they were connected with labor? You feel you could?

A. Well, both sides were involved, you know.

Q. I understand that.

A. Labor and industry.

Q. Surely. And sometimes labor was wrong in some of those disputes that you heard?

A. Right.

Q. Sometimes management was wrong?

A. That is right.

Q. You tried to make adjustments, and when you could make them you rendered decisions; those decisions I doubt were carried out by respective agreements?

A. That is right.

Q. Now, I think you said to Mr. Hogan that you read a great deal about this case, did you? Or was I wrong in——

A. Yes, I read something about it, surely.

Q. Would you say you read a great deal about it?

A. Yes, I think so.

Q. And what was the nature of your reading about this case?

A. Oh, columns, and things of that sort, general newspaper reports.

[fol. 440] Mr. Hogan: The People will excuse Mr. Sozzi.

The Court: Excused by the People.

(Talesman excused.)

ARTHUR S. SHERWIN, a talesman, residing at 676 Riverside Drive, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Sherwin, what is your occupation, sir?
A. Commercial banking, foreign field.
Q. And how long have you been in that business?
A. Fifteen years.
Q. What company is it, or bank?
A. Commercial Bank & Trust Company.
Q. And do you know any of the persons whose names have been mentioned here?
A. None.
Q. Did you have any dealings with any of the firms?
A. No, I have not.
Q. You say you are in the Foreign Department?
A. Yes, sir.
Q. And have you served as a juror before?
A. I have.
Q. Do you know of any reason why you could not be just and impartial, if selected as a juror in this case?
A. I do not.
Q. And would you promise, if selected as a juror, that you would not permit prejudice or sympathy to influence your verdict in any way?
A. I would.
Q. And you would render a verdict exclusively on the testimony that you would hear from the witnesses in this case?
A. That is right.
Q. And you haven't read—have you read anything about [fol. 441] the case?
A. I must have, a long period ago, but I don't recall the details, and it left no impression.
Q. And you have no opinion that would be prejudicial to either side?
A. I have not.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Sherwin, have you any ideas, fixed ideas concerning labor or its representatives, which would prevent you from giving the defendants a fair and impartial trial?

A. No, sir, I have not.

Q. Have the cases that you have sat on as a special juror been murder cases?

A. There were three in 1943, yes.

Q. All murder cases?

A. All murder.

Q. Have you ever sat as a grand juror?

A. No, sir.

Q. Have you ever sat as a regular juror in the Court of General Sessions?

A. Yes, five or six years ago.

Q. Have you sat as a juror in civil cases?

A. Yes.

Q. And you are, in short, familiar with the difference in the rules of evidence between civil and criminal trials?

A. I am.

Q. Do you know of any reason that would prevent you from being a fair and impartial juror in this case?

A. No, sir.

Q. Any fact that you think we ought to know, which would enable us to determine in our minds whether to select you as a juror or not?

A. No.

Mr. Polakoff: No challenge.

Mr. Hogan: The juror is satisfactory.

[fol. 442] Mr. Polakoff: Challenged by the defense.

(Talesman excused.)

Mildred Simon, a taleswoman, residing at 147 West 55th Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Is it Mrs. Simon?

A. That is right.

Q. Are you employed at all?

A. Well, I am, right now, part time.

Q. And where?

A. With the Plymouth Shops, ladies' accessories.
Q. Ladies' accessories, the Plymouth Shop?
A. That is right.
Q. And your husband is what?
A. A printer.
Q. I beg your pardon?
A. My husband is a printer.
Q. And the name of your husband's company?
A. John L. Schoenfield Company.

The Court: Please try to raise your voice.
The Taleswoman: John L. Schoenfield Company.

Q. And where is your husband's printing shop?
A. 333 West 52nd.
Q. How long has he been in that business?
A. Oh, he is there about 30 years.
Q. How long have you worked for the Plymouth Shops?
A. Well, I—last year I worked there about six or seven months, and I believe I will be doing the same thing this year.
[fol. 443] Q. Have you served as a juror before?
A. In civil cases. I have been called several times on these cases, but I have never been accepted.
Q. Do you know of any reason why you could not serve in this case and be fair and impartial?
A. Well, my son happens to be an attorney, and he is interested in labor laws, and we have discussed this case quite a bit, since the indictment.
Q. So that you do have an opinion that might work to the prejudice——
A. Definitely.

The Court: Excused.

(Taleswoman excused by the Court.)

JOHN W. WITHERINGTON, a talesman, residing at 301 West 22nd Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Witherington do you know of any—do you know of the persons whose names were mentioned in this courtroom?

A. I do not.

Q. Have you had dealings with any of the companies?

A. I have not.

Q. Do you know of any reason why you could not be fair and impartial to both sides, if selected as a juror?

A. I am afraid I would, in this case. I have served on two juries, but I don't feel as though I could honestly serve today.

By the Court:

Q. You mean you have an opinion?

A. Yes, sir.

[fol. 444] Q. Which you couldn't lay aside?

A. Yes.

The Court: Excused.

(Talesman excused by the Court.)

The Court: Draw six.

The Clerk: Jurors, kindly answer and step forward as your names are called. Herman C. Fuchs, William H. Forsythe (to which there was no response).

The Court: He was excused by the Court.

The Clerk (continuing): Donald B. Newhall, Matthew V. McBride, Arthur H. Alexander, Emanuel E. Shinkel, Junius H. Smith.

(The above-named talesmen were then sworn collectively by the Court, and thereafter examined.)

Herman C. Fuchs, a talesman, residing at 55 Cooper Street, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Fuchs, in Cooper Street in New York County?

A. Yes; that is the upper end of Manhattan Island.

Q. Oh, at the upper end of Manhattan Island?

A. That is right, just below Spuyten Duyvel.

Q. Do you know any of the persons whose names have been mentioned?

A. Not the individuals. I do know of the—one of the—two, rather, of the firm names.

Q. And what firm names are they?

[fol. 445] A. Mason & Hanger and also Walsh, as it relates to a job in lower New Jersey; that is, by reason of my occupation.

Q. Do you know any of the officials of those companies?

A. No, I do not.

Q. What is your occupation?

A. Liability and Workmen's Compensation underwriter.

Q. How long have you been in that field?

A. Well, I have been with the company for 23 years.

Q. And what is the name of the company?

A. The Indemnity Insurance Company of North America.

Q. On John Street?

A. 99 John Street, that is right.

Q. Well, do you think that you could be fair and impartial if selected as a juror in this case?

A. I can't say that. As I say, we had the liability insurance for the Lackawack Dam job for Mason and Hanger. I don't know what the relationship is here or whether any facts or figures——

Q. Is it your opinion that the business your company did on that job might be confused with the testimony in the case, if it dealt with the Lackawack Dam?

A. It may, at that.

The Court: Excused.

Mr. Hogan: The testimony will, your Honor, deal with it.

(Talesman excused by the Court.)

[fol. 446] Donald V. Newhall, a talesman, residing at 130 East 67th Street, Manhattan, New York, was then examined on the voir dire as follows:

Q. Mr. Newhall, do you know any of the persons whose names were read out here?

A. No.

Q. Have you had dealings with any of the companies?

A. No.

Q. What business are you in, Mr. Newhall?

A. I am a painter, portrait painter.

Q. And have you, in addition to that, been in any business or profession at any time?

A. No. That has been my profession.

Q. Have you served as a juror, Mr. Newhall?

A. Yes.

Q. Do you know of any reason why you could not be just and impartial in this case?

A. No, I do not. I have a feeling, which I think a great many people have, who have boys in the service, that the unions have not been doing—unions and their leaders have not been doing all that they could.

Q. You recognize that hasn't anything to do with the case?

A. I recognize that hasn't anything to do with the case.

Q. Or the persons charged with the commission of crime?

A. No.

Q. Now, can you assure us that, whatever that feeling is, you will completely put it out of your mind and sit as an umpire of the facts in this case, and render a verdict exclusively from the testimony as it comes from the witnesses?

A. Yes.

Q. You wouldn't permit prejudice or sympathy to influence your verdict in any way?

A. No.

Q. And if you had a reasonable doubt as to the guilt of these defendants, can you promise us that you would vote to acquit them?

A. Yes.

[fol. 447] Q. You haven't anything else in your mind, that has been suggested by any [redacted]estions asked previous jurors?

A. No.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Newhall, the feeling as expressed by you concerning labor, is such that it would influence you in a decision of this case, would it?

A. No. I would go by the facts.

Q. You realize that many laboring people in this country also have sons and daughters in the service. Whether you may disagree with them on their principle or not, as

to strikes and other difficulties, you feel sure that that would not influence you in reaching a conclusion in this case?

A. No.

Q. Have you served as a juror before?

A. Yes.

Q. A special juror?

A. Yes.

Q. Have you ever been a member of a grand jury?

A. Never.

Q. Have you read sufficiently about this case to cause you to have a definite impression that might be prejudicial to either side?

A. I haven't read anything about it, except seeing the headlines.

Q. Do you know of any reason that you could not be a fair and impartial juror?

A. No, I know none.

Q. Do you know any fact that you ought to acquaint us with, so we can properly determine whether to accept you as a juror?

A. No, I don't know anything.

[fol. 448] Mr. Polakoff: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Polakoff: Challenged by the defense.

(Talesman excused.)

MATTHEW B. MCBRIDE, a talesman, residing at 230 Riverside Drive, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. McBride, what is your occupation, sir?

A. I am a department manager at Macy's.

Q. And what department do you manage?

A. I have a group of service departments, engaged in repairing merchandise.

Q. And have you had mechanical training? Is that why you are——

A. No, no—just administrator.

Q. Do you supervise mechanics in those departments?

A. A group of 60 technicians.

Q. I beg your pardon?

A. A group of about 60 technicians, engaged in repairing.

Q. Are they members of a labor union?

A. Yes, they are.

Q. What union is that, Mr. McBride?

A. It is a department store union affiliated with the C. I. O.

Q. Do you have machinists and toolmakers there?

A. No; I have watchmakers, engravers, jewelers, various types of repairmen.

Q. I think you said you have been there five years?

A. Fifteen years.

[fol. 449] Q. And prior to that?

A. Prior to that I was traveling for about a year. Before that I was in business with my father, on the West Coast.

Q. And in what business was that, sir?

A. He was developing a small coal mine.

Q. Were you born on the West Coast?

A. Yes—in Montana.

Q. Montana. And do you know any of the persons whose names have been mentioned?

A. No, I do not.

Q. Are you acquainted with any of the companies?

A. No.

Q. You have been in New York 15 years?

A. Fifteen years.

Q. Have you served as a juror at any time?

A. Once before, about four years ago.

Q. In a criminal case?

A. Yes.

Q. Do you know of any reason why you could not be just and impartial in this case?

A. No, I do not.

Q. And could you promise the attorneys for the defendants and myself that you wouldn't permit prejudice or sympathy to influence your verdict in any way?

A. I would.

Q. Has anything suggested itself to you, after listening to the questions that we have been asking jurors for three days now——

A. No.

Q. (Continuing:) —that you think would be helpful to us?

A. I, of course, have dealings with labor people, but it has not formed any prejudice in my mind, or would affect me in any way in my judgment here.

Q. Have you read about this case?

A. Only in the last few days, that the case was being brought to trial.

[fol. 450] Q. And you haven't any opinion that would be prejudicial to either side?

A. No, I have not.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Because of the circumstances over at Macy's, in that you employ men who are members of a C. I. O. industrial union—these two defendants happen to be members of the American Federation of Labor. That would not in any way set up a prejudice in your mind against them, would it?

A. No; it would have no bearing on it.

Q. Your reading has been very slight, on this case?

A. Non-existent, I might say.

Q. And you don't know any of the firms or the members of the firms who were mentioned here on the first day?

A. No.

Q. Do you know generally what the project is about, the nature of the work done there, a general idea of the indictment as it was described and outlined to you by Mr. Hogan?

A. That is right.

Q. Now, in your capacity over at Macy's, do you sit in and negotiate contracts for these men who work under you?

A. No.

Q. With representatives of their unions?

A. No; I have nothing to do with that.

Q. And you do not come in contact with union leaders?

A. No, merely minor officials, you might call them.

Q. Have you ever been in contact with them—close contact, like the negotiation of contracts?

A. No.

Q. As a result of any experiences that you may have [fol. 451] had with them, however slight, has that formed anything in your mind that might honestly set up a prej-

udice, or something that might act as a bar to your giving these men a fair and impartial trial?

A. No.

Q. Your service in this court prior—or rather the Court of General Sessions, was it?

A. Yes.

Q. It was in a murder case?

A. No, it was an embezzlement case.

Q. What case was that?

A. I think the man's name was Levin. He was the auditor of Fox Movietone News.

Q. Of course, that case is no part of this, and you wouldn't allow anything that happened in that case to in any way affect your judgment here?

A. No; it has no bearing.

Q. You would take the law exactly as his Honor gives it to you, without any reservations, regardless of what your opinion of the law is or what you think it should be?

A. Of course.

Q. You would not consider anything else but the facts as you hear them in this court?

A. Right.

Q. Would you promise now not to form or make up any opinion in your mind before this case is actually given you by his Honor?

A. Of course.

Mr. Fitzsimmons: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

Mr. Fitzsimmons: Satisfactory to the defense.

(The talesman was accepted and sworn as alternate No. 1.)

[fol. 452] ARTHUR ALEXANDER, a talesman, residing at 65 Central Park West, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Alexander, what is your business?

A. I am engaged in the new and rebuilt machinery business. My duties are buying, selling, laying out of plants, and catering to the chemical and allied industries.

Q. And how long have you been engaged in that work?

A. Fifteen years.

Q. And the name of the company?

A. First Machinery Corporation.

Q. And prior to that time, 15 years ago, what did you do?

A. I was in Wall Street, with Jaeckle & deCoppet.

Q. Have you had any dealings with any of the companies, the names of which were read out in this courtroom?

A. No, sir.

Q. Do you know any of the officials?

A. No, sir.

Q. Do you know the defendants?

A. No, sir.

Q. As far as you are aware, you don't know any of the friends of the defendants?

A. None of them at all.

Q. You have served as a juror before?

A. No, sir. I have never served.

Q. Have you heard the questions that have been asked the various jurors here? Can you think of any reason why you could not be just and impartial in this case?

A. None whatsoever.

Q. Have you read anything about the case?

A. Just recently.

Q. Has it left you with any opinion that would be prejudicial to either side?

A. None at all.

Q. You think you could render a verdict simply and [fol. 453] solely on the testimony as it comes from the witnesses?

A. Yes, sir.

Q. Did you, in your work in the last 15 years, have dealings with labor union officials at all?

A. None whatsoever.

Mr. Hogan: No challenge for cause.

By Mr. Polakoff:

Q. Mr. Alexander, you run a shop where you repair the machines which you buy?

A. Yes, sir.

Q. And do you employ labor for that purpose?

A. That is right.

Q. And through that employment of labor, have you had any difficulties with unions or *its* representatives?

A. None whatsoever.

Q. I understand you to say you have never read about this case—much, in any event?

A. None at all, outside of the last couple of days.

Q. And you have never discussed this case with anyone?

A. No, sir.

Q. Have you served as a special juror before?

A. No, sir.

Q. You have been present in court during the last two or three days?

A. I have.

Q. And you have heard the questions concerning the rules in criminal cases, that jurors are requested to observe, about reasonable doubt, presumption of innocence; and you are prepared to give the defendants the benefit of those rules?

A. I am.

Q. Do you know of any reason why you could not give both sides a fair trial?

A. None whatsoever.

Q. Is there any fact you think either of us, either side, [fol. 454] ought to know, that would help us formulate an opinion whether we should select you as a juror or not?

A. No.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: The juror is satisfactory to the People.

By Mr. Polakoff:

Q. Do you employ union labor in your machine shop?

A. No, sir.

Q. Has labor ever attempted to organize your shop?

A. No, sir.

Q. Do you employ many people?

A. Fifty-five.

Mr. Polakoff: Challenged by the defense.

(Talesman excused.)

EMANUEL E. SHINKEL, a talesman, residing at 175 Riverside Drive, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Shinkel, do you know any of the persons whose names were mentioned?

A. No, sir.

Q. Have you had dealings with any of the firms?

A. No, sir.

Q. What is your occupation, Mr. Shinkel?

A. Sales manager of the Russed Pharmacal Corporation.

Q. What is the name of the pharmacy?

A. Russed.

[fol. 455] Q. How long have you been sales manager for that company?

A. About six months.

Q. And prior to that, what did you do, Mr. Shinkel?

A. I was connected with the International Vitamin Corporation, as district sales manager.

Q. International Vitamin——

A. Corporation.

Q. As salesman?

A. District sales manager.

Q. How long with the International Vitamin?

A. Ten years.

Q. Do you have pharmaceutical training?

A. Well, I have been in the pharmaceutical field for about 25 years with various companies in the field.

Q. As a salesman?

A. Salesman, of course—in inside work at the beginning, start—then sales work, various companies: Lehn & Fink, Schieffelin, various companies of that type. This Russed Pharmacal Corporation, I am one of the officers of the company.

Q. Do you know of any reason why you could not be fair and impartial to both sides, if selected as a juror in this case?

A. No.

Q. You have heard the questions asked the various jurors. Does anything occur to you that would be helpful and informative to Mr. Fitzsimmons, Mr. Polakoff and myself?

A. No.

Q. Have you read about the case?

A. Just at the start of the week.

Q. Did your reading give you any opinion with respect to the guilt or innocence of the defendants?

A. No.

Q. You are sure that you wouldn't permit sympathy or prejudice to influence your verdict in any way, if you are selected as a juror?

A. No.

Mr. Hogan: No challenge for cause.

[fol. 456] By Mr. Polakoff:

Q. Mr. Shinkel, have you served as a special juror before?

A. Yes, last year.

Q. In a murder case?

A. Yes.

Q. And have you had other jury experience?

A. Yes, I have served in the civil courts.

Q. And have you ever been a member of a grand jury?

A. No, sir.

Q. Have you any fixed opinions concerning labor or its representatives, which would prevent you from giving the defendants or the People a fair and impartial trial?

A. No.

Q. Have you discussed this case with anyone?

A. No.

Q. Have you read about it, sufficiently to cause you to have formed a prejudice or favor towards the defendants?

A. No.

Q. Do you know of any reason why you could not be a fair and impartial juror?

A. No, sir.

Q. Can you think of any fact which you believe either side should know, that would enable it to exercise its discretion in selecting you as a juror?

A. No, sir.

Mr. Polakoff: No challenge for cause.

Mr. Hogan: We will excuse Mr. Shinkel.

(Talesman excused.)

JUNIUS H. SMITH, a talesman, residing at 762 Riverside Drive, Manhattan, New York, was then examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Smith, do you know of any reason why you could not be fair and impartial to both sides in this case?

A. No, I do not.

[fol. 457] Q. Do you know any of the persons whose names were read out in the courtroom?

A. No.

Q. Have you had dealings with any of the firms?

A. No.

Q. How long have you lived in New York City?

A. Except for two years in Westchester, since 1919.

Q. And your occupation?

A. I am with Brooks Brothers.

Q. And how long have you been with Brooks Brothers?

A. Six months.

Q. Prior to that?

A. I was retired for three years, and prior to that I was 26 years with the Union Carbide & Carbon Corporation and its subsidiaries.

Q. Did you have any dealings with labor union officials during your tenure with Union Carbide?

A. No.

Q. Have you served as a juror before?

A. Yes.

Q. In criminal cases?

A. Yes.

Q. Do you have any doubt in your mind that you could decide this case strictly on the testimony as it comes from the witnesses?

A. No.

Q. Would you promise that if selected as a juror you wouldn't permit prejudice or sympathy to influence your verdict in any way?

A. I would.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Your card, Mr. Smith, indicates that the year of your birth was 1875?

A. That is right.

Q. Would you mind telling me in what month?

A. In August.

[fol. 458] Q. August?

A. Yes. I realize I am pretty near the limit, but I am still in good health.

Q. All right. My good wishes that your health continues good.

A. Thank you.

Q. What did you tell Mr. Hogan you did before you retired?

A. I was for 26 years with the Union Carbide & Carbon Corporation and their subsidiaries. in the treasury department for the last 20 years of that.

Q. Treasury Department of the Union Carbide?

A. Yes.

Q. I imagine you retired from that, on that company's——

A. I was retired from that department, yes.

Q. From that department. Did you in your experience ever come in contact with labor union leaders?

A. No.

Q. Anything having to do with labor?

A. No, I never have.

Q. How much reading did you do about this case?

A. Only in the last few days, the headlines.

Q. What evening paper do you read, sir?

A. The Sun.

Q. Is there anything that you want to tell us, that might help me, aid me, in accepting or rejecting you?

A. I don't think so, except that I am now a member of the union, which I was told I would have to join, when I got my new job; that is, when I went with Brooks, they said that everybody had to belong to the union, so I joined. I don't think it is either anything for or against my job in any way, and it has had no impression.

Q. What union is that, by the way?

A. I don't know. I am very frank with you; I don't know. [fol. 459] I paid my initiation, and the monthly dues are taken out of my pay.

Mr. Fitzsimmons: No challenge for cause.
Mr. Hogan: The juror is satisfactory to the People.
Mr. Fitzsimmons: Peremptorily challenged.

(Talesman excused.)

The Court: Draw one.

FRANKLIN CARTY, a talesman, residing at 2 Grove Street, Manhattan, New York, was duly sworn by the Court, and was examined on the voir dire as follows:

By Mr. Hogan:

Q. Mr. Carty, do you know of any reason why you could not be fair and impartial to both sides in this case?
A. No, sir.
Q. What is your present occupation, Mr. Carty?
A. I am retired.
Q. And how long have you been retired?
A. About 12—15 years.
Q. And before that period, with whom were you associted?
A. I was a storekeeper, also a salesman of general merchandise.
Q. And what was the name of the general merchandising company?
A. Levi, Strauss & Company, San Francisco.
Q. Were you ever connected with a law enforcement agency?
A. No, sir.
Q. Not at any time?
A. No, sir.
[fol. 460] Q. Do you know any of the persons whose names have been mentioned in this courtroom?
A. No, sir.
Q. Have you had dealings with any of the companies, the names of which have been mentioned?
A. No, sir.
Q. How long have you been in New York City, Mr. Carty?
A. About 15 years.
Q. And prior to that?
A. Well, I was born and raised in California, spent 14 years—no, about 18 years in Honolulu.
Q. Have you served as a juror at any time?

A. Yes.

Q. In criminal cases?

A. Yes.

Q. Have you read about this case at all?

A. No; I didn't even read Monday. I know that some of the jurors had the paper, but I didn't read it, I didn't have it.

Q. You have no opinion that would be prejudicial to either side?

A. None whatever.

Q. Have you had dealings at any time with labor union officials?

A. Never.

Q. And if selected as a juror in this case, you could completely erase from your mind any prejudice or sympathy?

A. Well, there is no sympathy or prejudice in my mind. I never had any dealings with them.

Q. And if a prejudice should come into your mind at any time during the trial, you would be able to base your verdict strictly on the testimony?

A. Certainly.

Q. And you wouldn't permit any such prejudice or sympathy to influence your verdict in any way?

A. No.

Q. You have heard, I guess, most if not all of the questions that have been asked. And is there anything that you want to volunteer, that you think would be helpful to the [fol. 461] attorneys for the defense or myself, in determining your availability to serve in this case?

A. No.

Mr. Hogan: No challenge for cause.

By Mr. Fitzsimmons:

Q. Mr. Carty, you said, before you retired, you were with the firm of Levi-Strauss?

A. Levi, Strauss & Company, San Francisco, wholesale dry goods.

Q. And prior to that you were in Honolulu?

A. No. Then I was with Baker & Hamilton. That is a hardware house in San Francisco. And prior to that I was in Honolulu.

Q. And the nature of your work with Levi-Strauss and the hardware firm was what—salesman?

A. Salesman. All my life it has been general salesman, in either dry goods or hardware or general merchandise.

Q. You followed the same line in Honolulu?

A. I had my own store there.

Q. In Honolulu. How many years were you there?

A. I beg your pardon?

Q. How many years were you there?

A. I would say about 18 years.

Q. Was that——

A. Well, I see your point. I was in Honolulu at two different visits, but before and after. I thought there was good prospects there.

Q. That is it, thank you. So that one could sum up your occupation in saying "general business"?

A. General business.

Q. That would be correct?

A. Most of the time was my own store, and then I was employed by others for perhaps six or eight years.

Q. And when did you last serve as a special juror—no [fol. 462] exact date—approximately?

A. Well, do you—I can name the case, but not the name of it—yes, I can name the case.

Q. What one was it?

A. Criminal libel.

Q. Oh, yes. Daily Press case, Clarence Hathaway?

A. Oh, no, it is the Worker.

Q. Clarence Hathaway?

A. Yes, sir, that is the case.

Q. And you have had some service before that time?

A. Not on the general panel—the General Sessions.

Q. Now, if you were chosen in this case, would you take the law from his Honor in every respect?

A. I certainly would.

Q. And would you consider none but the facts in this case?

A. That is all.

Q. You wouldn't let anything that happened in any of the other cases that you served in interfere with your judgment here, except as you gain general experience from those cases?

A. That is right.

Q. And if you had a doubt in your mind, a reasonable doubt, either from the evidence or the lack of it, would you resolve that doubt in favor of the defendants?

A. Certainly.

Q. You wouldn't hesitate to vote for——
A. I wouldn't hesitate.

Mr. Fitzsimmons: No challenge for cause.
Mr. Hogan: The juror is satisfactory to the People.
Mr. Fitzsimmons: The juror is satisfactory.

(The talesman was accepted and sworn as alternate No. 2.)

[fol. 463] (The jury of twelve and the two alternates were then collectively duly re-sworn by the Court.)

(Court and counsel confer.)

The Court: The jurors not on this case are excused from further service, with the thanks of the Court and the People for the attendance they have given at this term. No further attendance is required of the other jurors.

If the jurors on the case will just bear with the Court and the attorneys for just a few moments, we probably may arrange for a longer vacation than two o'clock.

(Court and counsel confer.)

ADMONISHMENT TO JURY

The Court: Members of the jury, we are about to take another recess. As you have already discovered, it is obligatory upon the Court to admonish you every time we take a recess. No one knows why, but that is the law. And you are going to be tired out with the admonishments that you receive from the Court, no doubt, before this trial is over. Nevertheless, I have to admonish you whenever we take a recess.

That admonishment is that you keep your minds open. In the first place, don't discuss this case among yourselves, because you are only going to receive this case piecemeal; you can only hear one witness at a time, and part of that witness's testimony may be one day and part the next day. So don't form any opinion upon this case until you have heard not only the testimony of that witness but every witness, [fol. 464] the summaries of counsel and the charge of the Court. It may be that something the Court says to you in his charge may entirely alter any opinion that you may have already formed in the case, so you are only going to waste your time if you try to form your opinion in advance. A further reason for that is, of course, that it is only fair to

the defendants and fair to the People that you keep your minds open.

The People, of course, will present their proof first, the defendants will present their proof last, so that you should not be influenced by the testimony of the People's witnesses until you have heard the defense in this case. So keep your minds open.

One other thing: You are not to permit anyone to discuss this case with you—I know you understand that admonition perfectly—but there may be times when people will speak in your presence, you should not permit that either.

We are going to try to keep you members of the jury by yourselves. You are not going to be confined, you are going to be kept by yourselves, however, so that you won't hear comment by outsiders. And, of course, if you do, or if anyone—if you do hear comments, why, pay no attention to those comments. If anyone should attempt to discuss the case with you at any time, you report that to the Court.

Now, the Court will also suggest that you refrain from reading the newspaper articles about this case. Those [fol. 465] newspaper articles, some of them, will be based on testimony, perhaps, in the case; and undoubtedly there will be comments which are not binding on you and should not be read by you. Keep your minds open and just listen to the testimony, and then when the time comes you will be able to agree on a verdict one way or the other without any outside influence.

Now, we are going to recess until Monday morning at ten o'clock.

The Clerk: Bail is continued on both defendants.

(Whereupon, a recess was taken until Monday, March 5, 1945, at ten o'clock a. m.)

Room 1530, Criminal Courts Building,
New York City,
Monday, March 5, 1945.

TRIAL CONTINUED PURSUANT TO ADJOURNMENT

(The following took place in chambers.)

MOTION TO DISMISS INDICTMENT—DENIED

Mr. Polakoff: May it please your Honor, in view of your Honor's decision on the motion for a bill of particulars,

which leaves the indictment in its original form, the defendants move to dismiss the indictment on the ground that it doesn't sufficiently allege the crime of extortion as defined by the Criminal Code.

The Court: Denied.

[fol. 466] (The trial then continued as follows:)

(All the jurors, the two alternates, and both defendants, were present.)

OPENING ON BEHALF OF THE PEOPLE

(Mr. Hogan then opened to the jury on behalf of the People as follows:)

Mr. Hogan: May it please your Honor, Mr. Foreman, Mrs. Harding, and gentlemen: At this time it is my duty to make an opening statement in which I shall refer generally to some of the proof which the People will offer in support of the accusations contained in this indictment.

The Grand Jury of New York County charges these defendants, Joseph Fay and James Bove, with committing the crimes of conspiracy and extortion. The indictment contains seven counts. The first count charges the defendants with conspiring to commit the crime of conspiracy—conspiring to really commit the crime of extortion; and then there are six counts, making up the seven, which charge the defendants with the crimes of extortion.

Now, these seven counts represent separate and distinct crimes, which, under the law of our State, are tried together, rather than separately. This procedure is followed when the crimes are connected, and when they are part of a common scheme or plan. It is alleged that the plan in this case was to extort money from persons and corporations which are generally described in the indictment as contractors. In other words, all crimes set forth in the indictment are [fol. 467] part and parcel of a criminal enterprise in which it is alleged these defendants participated. It was a partnership in crime, and the business of the partnership was to extort money from these contractors. That is the indictment in this case.

You know, you have been told on the voir dire, that it does not constitute evidence. It is simply a pleading, a device that is used to bring the issue before you. I am not

going to burden you with the reading of this twelve-page document which constitutes the indictment. At the proper time, after both sides have put in all of the proof, the Court will submit to you those counts in the indictment which you will be called upon to consider.

The evidence for the most part will relate to dealings between the defendants and the contractors in connection with what is known as the Delaware Water Supply System. You have heard, I am sure, of that enormous New York City project, and I think it will be helpful if I tell you a little more about it at this time.

The System, the Delaware Water Supply System, was developed by and supervised by the Board of Water Supply of the City of New York. That Board was organized in 1905, just a few years after the consolidation of the Greater City in 1898. Simply stated, the job that was given to that Board was to investigate and to anticipate the needs of New York City for water, and to obtain that water.

Now, to carry out that task, the Board determines on [fol. 468] new sources of water, conducts field surveys, prepares detailed plans of construction, purchases whatever land is necessary, condemns land, enters into contracts for shafts and dams, foundations, tunnels, bridges, et cetera—exercises a general supervision over it, of course, watches its progress at all times.

Then, when the job is finally completed, and there is a steady stream running from some water sheds in the Catskills to your kitchen faucet, the system is turned over to the Department of Water Supply, Gas and Electricity, and that City Department is then responsible for administering the system and for sending out bills to us consumers.

Back in 1905, when the Board was formed, the City obtained its water from the Croton Lakes on the east side of the Hudson River, from a few wells, particularly in Brooklyn, and from several private water companies. The first big undertaking of the Board was what is known as the Catskill system. Water was drawn from that source as early as 1917, although the Catskill system was not delivering full capacity until 1923. Catskill water, contrary to Croton water, runs from the west side of the Hudson River, and in order to bring that supply to the City, it was necessary to build the first big tunnel under the Hudson River.

Now, from the Croton and Catskill Water Supply Systems, the City of New York receives every day approxi-

mately one billion gallons of water. While this amount [fol. 469] has been sufficient for our needs, there have been years, and more notably seasons, in which there was a threatened scarcity. To remove entirely the danger of shortage and to adequately provide for a possible increase in population, plans were drawn as early as 1921 for the Delaware Water Supply System.

The Board of Estimate approved those plans in 1928, but litigation which went to the Supreme Court of the United States and which involved the States of New Jersey and Pennsylvania and New York, and then a depression, delayed the commenceemnt of this work for several years. The Delaware System, I have told you that most of the testimony here will concern that system—that system provides for three enormous reservoirs, the largest of which will have a capacity of about 150 billion gallons. They are located west of the Catskills near the Pennsylvania State Line and will be supplied by water from the mountain streams and from the headwaters of the Delaware River. The aqueduct or water tunnel which will bring this new supply to the City is over one hundred miles long, and passes through Delaware, Sullivan, Ulster and Orange Counties, underneath the Hudson Rixer, and then down through Dutchess, Putnam and Westchester. It connects with the west branch reservoir of the Croton System and the Kensico Reservoir of the Catskill System,—thus permitting the water of the Delaware to pass through these two reservoirs. It is expected that it will provide an ap- [fol. 470] proximate 55 million gallons of water daily, thus increasing our present supply by about fifty per cent, removing entirely any threatened scarcity and insuring an adequate water supply for a population of some 11 or 12 million people.

The estimated cost to the City of New York is about $300,000,000. So extensive and complicated was the project that the Board of Water Supply, when it first advertised for bids in 1937, divided up the entire work into many contracts. Some of the largest construction companies in the United States offered to do this work and submitted bids on these various contracts.

The proof will show that in some cases these companies distributed the risks on the contracts by forming syndicates or groups, and these companies, acting as a group, made bids on the contracts.

Now, how did the two defendants in this case figure in all this? The defendant James Bove during all the period covered by this indictment was the International vice-president of the Common Laborers Union, an American Federation of Labor organization with about 350,000 members. He was also the Eastern District representative, he was in charge of the New York State Regional office. In addition, he was the secretary and treasurer of Local 60, a Westchester affiliate of this union.

The defendant Joseph Fay is the International vice-president of the Union of operating engineers, and that is an American Federation of Labor organization with ap-
[fol. 471] proximately 100,000 members. He is likewise the Eastern District representative, and in addition he is the business agent of Local 825 of the same union.

Here were two of the most powerful union leaders in the country. The proof will show that the contractors had to look to Bove for laborers, cement and concrete workers, powder men, drill runners, blasters, and many other categories of workmen.

To Fay they turned for men who could operate the compressors and blowers, pumps, drills, tractors, derricks, concrete mixers, pile-drivers and stone crushers and many other machines used in the construction, alteration and repair of tunnels, foundations, shafts, dams, and practically every other type of construction.

The evidence will show that Fay and Bove decided to "cash in" on their power as union leaders. They sought out the low bidders on the various contracts and demanded money from them. Nor were they modest in their demands. The demand usually amounted to about one per cent of the contract price. In fact, one witness was told that he had no kick because the demand made on him was less than one per cent of the contract price. If the contract was for $10,000,000, therefore the demand would be about $100,000. And Fay and Bove made it unmistakably clear that if the money was not paid there would be strikes, slowdowns and other labor trouble.

The proof will show that Fay and Bove in this manner [fol. 472] actually obtained hundreds of thousands of dollars. Now, this is what constitutes extortion. Under the law, extortion is the obtaining of property from another, with his consent, but that consent induced by a wrongful use of fear. One may threaten to do an unlawful injury to

the person or to the property of an individual, where the threat is a type that may induce the fear under which money is paid.

In this case we are not dealing with threats to the person. We are dealing with threats only to the property of the individuals who represented these corporations. The threat to produce labor trouble, which involves strikes, slowdowns or interference wtih the normal course of work, no matter how worded, or how expressed—subtly or openly, directly or indirectly—constitutes a threat to do an unlawful injury to the property of an individual, and it is as the result of such threats that money was paid in this case.

For example, we propose to show that a company called Associated Contractors, Incorporated, was shaken down for $150,000 by these defendants. The Associated was one of those groups that I just referred to. It was composed of a number of companies—six, as a matter of fact in this case. The companies were the Walsh Construction Company of Davenport, Iowa; J. F. Shea, Incorporated, of Los Angeles, California; Henry J. Kaiser & Company, of Oakland, California; the Utah Construction Company, of [fol. 473] Ogden, Utah; the General Construction Company of Seattle, Washington; and the MacDonald-Kahn Company of San Francisco, California.

Engineers representing this group of companies prepared detailed estimates of the costs of various contracts advertised by the Board of Water Supply.

Early in July 1938, Associated submitted a bid on Contract No. 306. That was the number given by the Board of Water Supply, and it was one of these contracts on the Delaware Supply System. Associated also at that time deposited with the Board its certified check for $500,000, to guarantee execution of the contract. That was the procedure followed by the Board. Every time that a company bid on any of these contracts, even before the bids were opened, it was required to submit its certified check to guarantee that it would go through with the contract.

When the bids were opened in connection with this Contract No. 306, in the latter part of July, Associated was found to be the low bider. It received a contract which called for construction of some seven miles of tunnel in Westchester County. It was a part of this one-hundred-mile tunnel or water aqueduct which was to bring the water from the Delaware to New York City. The anticipated

duration of the job was five years and the amount of the contract was $21,333,000. When the contract was awarded early in August, the certified check for $500,000 was returned, but Associated was required to put up a surety bond [fol. 474] of $1,500,000, to guarantee performance of the contract. In addition, there was in the contract a penalty clause fixing daily liquidated damages if the job was not completed on schedule time.

Now, whenever a number of companies bid as a group on any contract, one of the companies was selected to head-up or supervise the job; and the sponsoring company for Associated was the Walsh Construction Company. As a matter of fact, Thomas Walsh, who was the president of the Walsh Construction Company, was also the president of Associated Contractors.

Sometime after it was known that Associated was the low bidder on Contract No. 306, but before the date on which the contract was actually awarded, Fay and Bove sent word to Mr. Walsh that they wanted to see him, and a meeting was arranged at the apartment of another officer of Associated, John MacDonald. That apartment was in this County, in New York County.

Present, then, at this meeting were the two defendants, Fay and Bove, and the two officers of Associated, Mr. Walsh and Mr. MacDonald. Fay started out by remarking on the size of the contract, and how nice it would be if everything was harmonious during the job. He also said that Bove and he wanted labor relations to be smooth, but that the officers of the Associated would have to pay them. Mr. [fol. 475] Walsh refused. They argued back and forth for a couple of hours, Fay and Bove persisting in their demands, and pointing out from time to time that if the officials of Associated paid, there would not be any strikes, slow-downs and other forms of labor trouble. Finally the Associated officials asked the defendants how much they wanted. Fay said $250,000. Well, Mr. Walsh told the defendants it was out of the question. There was further argument, further discussions, the defendants continuing to emphasize that payment would prevent labor trouble. MacDonald and Walsh went to another room to talk it over. They returned, and they made an offer of $100,000 to the defendants. Fay and Bove refused it. Another hour was spent in protesting and pleading with the defendants. At

the end of that time, Fay and Bove agreed to accept $150,000.

It can't happen here? Well, it did happen, and the proof will show that demand was made just as I have described, and that $150,000 was paid to the two defendants in this case, Mr. Fay who sits there, and Mr. Bove who sits—both sitting at the end of the table; and it was paid in cash at their request.

That money was extorted from one company, Associated Contractors, Incorporated, by Fay and Bove. They accomplished it by threatening to misuse their power as the representatives, the leaders of thousands of workers engaged daily in laborious, dangerous occupations.

Now, I want to repeat at this time that there is no ques- [fol. 476] tion in this case with respect to the rights of labor, the rights to organize, the right to bargain collectively, the right to declare strikes, and to lawfully picket. These union officials, however, are charged with the crime of extortion, which has not the slightest connection with the lawful aims and purposes of any labor union. There is no proof that the members of these unions knew what Fay and Bove were doing with their delegated powers, and in the name of these two American Federation of Labor unions.

Some of the witnesses in this case have known the defendants for a long time. They have had labor agreements with them on other jobs. They are working on jobs at the present time which concern Fay's union and that of Bove. They didn't come to the District Attorney's office of their own accord. The evidence will show that we conducted an investigation, that they came to our office pursuant to subpoena. Their company books were subpoenaed. Some of the witnesses refused to talk when first they came to the office. Some of them gave testimony at the outset which was neither complete nor frank. They will testify as to their relationships with these defendants and we believe they will convince you that demand was made by these defendants, that money was paid to these defendants, and that the witnesses paid it because they were afraid if they didn't pay it, their business would be hurt by labor trouble. [fol. 477] Members of the jury, we shall try to be as brief as possible, consistent with the fair presentation of our case. We shall also try to avoid cumulative proof, so as not to make this trial unnecessarily long, and we will

present testimony which will convince you beyond any doubt that these two defendants are guilty of the crimes charged in the indictment.

I thank you.

Opening on Behalf of Defendant Joseph Fay

(Mr. McGeehan then opened to the jury on behalf of the defendant Joseph Fay as follows:)

May it please the Court, Mr. Foreman, Lady and Gentlemen of the jury: I think in view of the fact that I happen to be a stranger in this Court, particularly because I wasn't present when you were being selected and interrogated, I ought to introduce myself in this case. I happen to be a member of the Jersey Bar, but I am not a member of the New York Bar. I have been kindly permitted by the Justice of this Court, Justice Munson, to appear in this particular case in association with Mr. Fitzsimmons who questioned you, for the defendant, Mr. Fay whom I represent.

Mr. Fay is a resident of the City of Newark, New Jersey, which is the city in which I practice law, and in a suburb of which I happen to live. He asked me quite recently to come into this case and associate myself with Mr. Fitzsimmons in the trial of it, and I have been engaged, after having just completed a rather long trial about a week ago, during this [fol. 478] past week in trying to read up something about the procedure and the law of the State of New York, which I naturally am not too familiar with, because my practice is in New Jersey, but I will try to overcome my shortcomings as much as possible in that respect through the assistance of my associate, Mr. Fitzsimmons.

In approaching this case I naturally read very carefully the indictment which has been presented by the State, or the People here, and which constitutes the charge upon which these two men are to be tried by you, and as you have been told in the course of the District Attorney's able opening, and as has been indicated to you when you were being selected, an indictment is a mere accusation of crime. It does not constitute any evidence whatever of the charges which it contains. It does not create any presumption of guilt of a defendant as to the charges which it contains, and it does not overcome the presumption of innocence which a defendant is entitled to under the law of this State, at

the opening of this trial, throughout the trial, and up to and including the time when you come to consider the evidence in the case, if the case is submitted to you for your decision. And so, as that indictment constitutes the charge, it contains and points out the issue that will be determined ultimately by you, and that issue, Lady and Gentlemen of the jury—the ultimate, fundamental issue [fol. 479] in this case, is a rather simple one and a very, very clear issue; and that is whether or not the defendants were guilty, under the facts and the law of this State, of committing the specific crime charged against them in this indictment in the several counts thereof.

Now the crime charged in each of these counts is the same, identical in content and in the language which describes it, except that each count refers to a different contractor and a different date, and a different amount. All those counts—there are several—are counts charging the specific, basic crime of extortion. The other count, the first count in the indictment, charges a conspiracy against these defendants, but there too, the object of the conspiracy which is charged against them is the crime of extortion—that they conspired to commit the crime of extortion in the manner described in the other counts as constituting such facts.

Now the indictment sets forth quite specifically and in accordance with the basic law of this State, the Penal Code, which defines quite clearly what the crime of extortion is. The indictment follows that, and it contains certain definite allegations which will be embraced in this issue. And the charge in the indictment and the definition of the law of extortion, which I believe the Court will ultimately charge you, and as Mr. Hogan has stated it in his opening to you—the crime of extortion charged here in each of these instances is not the mere payment of money to a labor union [fol. 480] representative or official by contractors—it is the payment of money extorsively, and the payment of money by way of extortion means that money is paid and received, obtained by the defendants, through force or fear engendered by the use of threats, and threats to do unlawful injury to the property of, in this case, the contractor or contractors who may have paid money to the defendants.

Under this charge in the indictment, that is the issue, Lady and Gentlemen; not whether or not money was paid by some of these contractors to the defendants in this case.

That is a necessary element of proof, one of the elements of proof in the case; and as the District Attorney has stated to you, you will hear evidence that money was paid, some money was paid, and substantial sums, by the contractors, or some of the contractors referred to in the indictment, to the defendants in this case. And if that constituted proof of this crime, if that constituted a crime by these defendants, under the laws of this State, that would be all they would need to prove. But it doesn't. The crime charged—the crime which the burden of proof will be upon the People to prove to you, not by a mere preponderance of evidence as in a civil case, but by evidence beyond a reasonable doubt, is the specific crime that they charge—that this money was paid as the result of threats—the use of force and fear and threats, either written or oral—to do injury, [fol. 481] and unlawful injury, to the contractors who may have paid any money. That issue, Lady and Gentlemen of this jury, upon that I say to you, and I believe I will be able to say with equal assurance at the end of this case, that the State will not sustain the burden of proving that; that the facts are not that way; that any money that may have been paid by any contractor to either defendant in this case was not paid by reason of any extortion, but was paid willingly and gladly to accomplish constructive and affirmative assistance and benefits to the contractors in the prosecution of this enormous project in which they had at stake many hundreds—if not these particular contractors—but in the aggregate some 300 million dollars, and many millions of dollars, applicable to the contracts of these contractors. I ask you to listen, as of course I know you will throughout this case, keeping in mind what is the ultimate issue; keeping in mind that these defendants contend that they did not commit the crime here charged against them, and that the State will not be able to prove it, and will not prove it.

I listened with great interest to the opening of the learned District Attorney, and to the interesting background of the great project for the Delaware Water Supply that was being worked upon by these contractors and the men employed by them to do the work, involving it is true hundreds of millions of dollars, a great stretch of aqueduct work, the [fol. 482] employment of thousands of men over a period of years; and I listened to the charges which he made pursuant to the indictment against these defendants, and I heard

him say that the People undertakes to prove these charges of the payment and the extortion of money. But I listened in vain for any specific statement of specific words or threats to do unlawful injury to the property of any of these contractors, and to whom it was said, and what was said, except for the general reference to one of these groups of contractors. And as I took it, by inference, a suggestion was made that strikes would be called if this money were not paid which the People refers to there.

I say there were no such threats made in that instance, or in any of the instances; that this money which the People (I keep inclined to say the State, because in New Jersey we call the Prosecution "the State"—here it is called "the People", and I hope you will forgive some shortcomings and slips of that sort which I am bound to make through the practice over there rather than here)—the People in their undertaking to prove this case, will of necessity bring before you the contractors who are referred to. I ask you to listen. The State has indicated they are not here voluntarily, the State says, they didn't come forth and make the complaint that culminated in this prosecution. They didn't, and that is correct. They made no complaints that they had money extorted from them. I think you will [fol. 483] find they never had any feeling or belief that any money was extorted from them, and the inception of the proceedings that led to this prosecution, I think you will find emanated, not from them, as the District Attorney has so frankly said, but emanated from the common enemy of these contractors and the common enemy of the unions represented by these men, and in respect to whom, in part, the contractors needed and desired the constructive, affirmative help of these officials whom they themselves, the contractors, were very very glad to pay money to for such assistance, legitimate, proper assistance, involving no disloyalty to their unions, and no threats to these contractors in the least.

And when this case is heard by you and completed, Lady and Gentlemen, knowing that the issue in this case is not the mere fact of the payment of any money, but the issue is the charge of extortion, and extortion means threats, and threats to do injury, and unlawful injury to the person who paid it—you will hear the evidence throughout in this case, and I know, I am utterly confident and certain, that, while I was not here during the time that you were chosen,

as jurors in this case—I know that all of you have stated that you will hear this case impartially, that you will not be influenced in any respect by any prejudices that you may or may not have, and which every one of us is entitled to have one way or the other on any subject under the blue sky of [fols. 484-820] heaven—we are all entitled to our personal thoughts, opinions or ideas—but when you undertake to sit in the jury box and assume a responsibility that is perhaps the most solemn that men can assume in civil life—to judge their fellow men in a criminal proceeding, to decide with an obligation as deep as that of the Justice upon the bench who presides over this court, to decide the fate of human beings under the criminal law of this state, I know that you will decide it as you said in summary in the oaths that you took—a true verdict render- according to the evidence and the law.

And when this case is submitted to you, if it is, for your decision, that is all we ask—that your verdict be solely upon the evidence and the law as given to you by His Honor. And I feel that in doing that, there can be nothing that would result from such application except an acquittal of the defendant whom I represent.

The Court: The defendant Bove waives opening.

* * * * * * *

[fol. 821] Mr. McGeehan: May it please the Court, I move, if it please your Honor, for the direction of a verdict of acquittal on behalf of the defendant, Joseph S. Fay on Count 4 of the indictment, on the ground that the proof on that Count is insufficient as a matter of law to warrant a verdict of conviction against him.

Mr. Polakoff: May I add further, your Honor, I make the same motion on behalf of the defendant Bove, and further add that there has been no proof whatsoever as to Count 4 of the Indictment.

The Court: Is that the Trap Rock Count?

Mr. Polakoff: Yes.

The Court: Any objection?

Mr. Hogan: No objection.

Dismissal of Count 4

The Court: The Fourth Count is dismissed.

Mr. Polakoff: If your Honor please, the procedure is for the direction of a verdict.

[fol. 822] The Court: I will dismiss that count but will reserve decision on the motion for the direction of a verdict.

MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNT 2

Mr. McGeehan: I desire to move, your Honor, for the direction of a verdict of acquittal on behalf of the defendant Joseph S. Fay on Count Two of the Indictment, on the ground that the proof on that Count is insufficient as a matter of law to warrant a conviction; and secondly, upon the grounds that there is no evidence whatever that any money was paid as alleged in that Count to the defendants by the corporation or persons mentioned herein; and no evidence of any threats having been made, as a result of which there was consent, induced by the wrongful use of force and fear, to any threats to do unlawful injury to the property of said corporation or persons. That is the Seaboard count.

The Court: That might be submitted on the question of attempt.

ARGUMENT ON MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNT 2

Mr. McGeehan: Does your Honor desire to hear me briefly upon that subject?

The Court: Yes, surely.

Mr. McGeehan: Shall I make all the motions first?

The Court: Well, let us take up Count 2 then. You join in that, do you?

Mr. Polakoff: Yes.

The Court: The defendant Bove joins in that motion.

Mr. McGeehan: Now, that is the count, your Honor will recall, involving the Seaboard Construction Company, and [fol. 823] I think if the record is examined, it will be found that there was no evidence that there was any threat made to the Seaboard Company or to anybody. The sole evidence is that Bove said to Perini, that "they"—that is the pronoun used in the testimony—wanted $125,000 on the Seaboard contract. The evidence shows there was no agreement to pay that, as the result of even that request, and no evidence that anything was said by the defendant Fay in regard to that whatever, except that on several occasions there is a hazy bit of evidence from time to time that he asked where Mr. McLean was, and he was always away, at one time on a trip around the world.

There is no evidence whatever that that sum, or any part of it, was ever paid, so that the record consists practically only of a request at one time by Bove for that amount of money, and his being told Perini would talk to McLean about it, and that is all that the evidence consists of on that count. So that there apparently was no attempt made containing any of the ingredients or elements of the crime of extortion whatever.

I therefore move to dismiss that count and for the direction of a verdict of acquittal upon it.

Mr. Hogan: May I be heard on that, your Honor? While it is true that there is no evidence that payments were made under this count, we ask the Court to consider submitting this count as an attempt. Mr. McGeehan's argument is that [fol. 824] Mr. Perini should be out in two, and in the early part of the conversation regarded as an official of Seaboard and the latter part of the conversation be regarded as an official of B. Perini & Sons.

Now, this man, who happened to hold both positions, in the Seaboard and B. Perini & Sons, heard the conversation. He it was who said to the defendants Fay and Bove, "I am getting a double trimming here," so that everything that was said in the conversation was directed to him as an official of both companies, and what was said was amply sufficient, your Honor. He was told that if he paid he wouldn't have jurisdictional disputes; he wouldn't have labor trouble; everything that the defendants felt would be argumentative and would be persuasive along those lines was said to this man.

At the very end of this conversation, he said to both defendants that he would have to report the conversation to his associates. The testimony is that he said he would have to report it to Mr. McLean, and that he would have to report it to his brothers, as other persons interested in these companies. Certainly the threats were conveyed to officials of both companies, since Perini was secretary of Seaboard, and president of B. Perini & Sons.

Mr. Polakoff: May I add an observation, your Honor? I believe the testimony also indicates, sir, that Perini said that, pursuant to the Seaboard Syndicate, Mr. McLean had sole jurisdiction over the Seaboard job; and I think there [fol. 825] is no testimony that Mr. Perini at any time advised Mr. McLean about the conversation.

It has been called to my attention, your Honor, that on page 801 the following testimony appears, as a statement from Mr. Perini on the stand, at the top of the page. He says, "Well, I will take the message back to Mr. McLean. He is the one that is heading up this contract, and that's a matter for him to decide." There is no testimony whatsoever that he did take that up, or that there was any result of any such conversation.

DECISION ON MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNT 2

The Court: Well, there is a question as to whether or not that amounts to an attempt. The Court will deny the motion at the present time, and of course will direct an acquittal at the proper time on the charge of extortion on that count, but will deny your motion as to a dismissal of the count at the present time on the attempt and let t' e jury consider it on the question of attempt.

Mr. Hogan: Your Honor, I always hesitate to say anything after the Court has ruled——

The Court: Go ahead.

Mr. Hogan: But, for the record, I want to call the attention of Mr. Polakoff that on page 804 the question was asked: "Now, did you report the conversation to Mr. McLean?" And the answer is, "Yes, I did."

The Court: Your motion is denied, but I will direct a verdict of acquittal on the extortion charge in that count.

[fol. 826] Mr. McGeehan: For the time being, may I have an exception to that ruling?

The Court: Certainly.

MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNT 3—DENIED

Mr. McGeehan: I desire to move for the direction of a verdict of acquittal on behalf of the defendant Joseph S. Fay, on Count 3 of the Indictment, on the grounds that the proof on that count is insufficient as a matter of law to warrant a conviction. That is the Mason & Hanger Count, your Honor.

The Court: Denied.

ARGUMENT ON MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNT 3

Mr. McGeehan: Your Honor does not desire any discussion?

The Court: Well, I will be glad to hear you, if you want to.

Mr. McGeehan: I wanted to point out this to your Honor briefly, as to all the counts on extortion in this entire indictment, and with relation to the first count for conspiracy, having to do with the alleged object of that conspiracy, it is our contention that under the statute—under the Code defining the crime of extortion, that there is required to be proven by the People a threat, either oral or written, to do unlawful injury to the property——.

The Court: You mean in so many words?

Mr. McGeehan: No, I don't think one would have to use the words, "I hereby threaten you," but I believe that under a reasonable interpretation of that statute, and under the cases in this State, that there is required to be an affirmative threat—words that constitute in their ordi- [fol. 827] nary meaning a direct threat in themselves, without the use of that word, to do specific harm or unlawful injury to the property of the person alleged to be the victim of the extortion. It is our contention on all of these counts that there is not in the evidence a single word, oral or written, constituting an assertion of any sort by this defendant that unless he were paid the money in question, he would do or cause to be done any injury, unlawful injury to the person or to the property of any of the persons or corporations named; and that there is in the case of several of the counts, which I will refer to, if permitted, when individually treated, affirmative statements by the complaining witness, so-called, that those threats were made to him.

Under those circumstances, under this count that I am coming to, Mr. Killmer, who is the official and an officer of the company, acting for it, testified that before he paid any money whatever, it was stated to him by this defendant that he thanked him for what at that time constituted a promise to pay some money, but he said to him, "You know, whether you pay anything or not, I would still do all I can for you on the job."

Now, that is the affirmative testimony of fact by Mr. Killmer, the representative of that corporation—in addition

to which the record is absolutely bare of the slightest statement, directly or indirectly, to Killmer by the defendant [fol. 828] Fay or the defendant Bove, or by the State's witness, Brewster, or anybody, of any element whatever constituting any threat against the corporation, the Mason-Hanger Company, or any of its officers. And that being so, the charge of extortion upon this count would seem to be absolutely without any foundation in evidence as to any of the elements necessary to constitute the essential ingredients of that crime, which in a large measure is a crime of threat to do injury to a person or property, resulting in the payment of money, by fear induced thereby.

Now, I don't pretend to be able to say that I have read every case in the State of New York, but I have read all of them that are referred to in the annotations in the Code, and I think it can be fairly safely said that there is no case, adjudicated case, in the State of New York, where there is not contained the recital of facts, specific, definite threats made by the defendant of such a nature that there could be no difference of opinion, no ambiguity, no mere implication or inference to predicate an idea upon, that there was a fear induced by such threats.

Now, there is some testimony in this case on several of these counts—certainly not on this—that the complaining witness was afraid that there was a possibility, or as one put it, that there might be something done—some strikes or labor troubles, that applies to all the counts—but that indefinitely hazy idea or feeling, or fear, none of them said [fol. 829] was induced by anything said by either of the defendants. Nor did they state that there was a fear that unlawful injury might be done to property. All of their testimony is equally consistent either with the fear, or an imagination on their part, that strikes might occur by other companies—other unions—things not under the control or direction of the defendants, and as to which, so far as their testimony shows, that fear was coupled with a hope that these defendants would help them in regard to it.

We search this record in vain, your Honor, for anything that even by way of implication or inference could be reasonably interpreted to permit of an inference of such a nature as to satisfy the fundamental rules of the Criminal Law; that is, that the circumstances of the facts be such as to be not only consistent with guilt, but utterly incon-

sistent with innocence or any reasonable hypothesis of innocence.

I think that is the fundamental rule quite universally. And that being the case, we say that if your Honor were to examine the testimony under Count 3, that it would be found that Mr. Killmer, who paid all this money for the Mason-Hanger Company, and which Mason-Hanger Company is asserted and stated in the indictment itself to be the company involved—it says, "The property of Mason & Hanger Company, Incorporated, a corporation,"—whose [fol. 830] property is being obtained—"from Miles I. Killmer and William J. Brewster, officers and agents of said corporation." Well, there is no proof that Brewster or any officer of said corporation, and the State, as I understand, in part of the trial, contended he was the agent of Killmer. But at any rate Killmer is the officer of the company, Mason & Hanger is the company whose property is alleged to have been received and extorted; and Killmer says nothing that he ever had any fear; Killmer says nothing was ever said to him at all except an assertion by Brewster, whom he testified he sent in effect to the defendants, or any other labor leaders that Brewster undertook to talk to—that Brewster said in conversation, and apparently advice to Killmer, his associate in the contract, "I think that in any event,"—in effect—these are not his words—"It would be worth that to us to have the friendship of the leaders of labor." So that we have on this count a situation where the man whose company is alleged to have been extorted says "nobody ever threatened me; nobody ever said a word to me." "I arranged with Mr. Brewster in advance for him to go, and he said he thought he could arrange something that we wanted accomplished with the labor unions."

Brewster said, in answer to Killmer's question, "Do you think you can arrange it?" Brewster says, "I think I can." And Killmer says, "Will you try or will you do so?" And [fol. 831] Brewster says, "Yes." And then Brewster said, "Now, what would you be willing to pay if I can?" And they discuss it, and they agree that they ought to be able to get whatever they wanted accomplished for $5000 a year.

So Mr. Brewster goes forth, authorized by Mr. Killmer, and then Brewster calls Killmer and says, "Come on, meet me at such and such a hotel." And they meet there, and no

conversation is had at all between Killmer and Fay whatever, except as I recounted before—that Brewster, who had gone there apparently to offer $5000 for something that he wanted—he comes out and says "They want $12,000." And Mr. Killmer, who is the Mason-Hanger Company, says, "I will have to take it up with my people, my other associates in the company; but if they are satisfied, it's all right with me." Whereupon Mr. Brewster goes back in, according to Killmer's testimony, and comes out with Fay and Bove, I think he said; but Fay says to him, "Mr. Killmer, thank you very much, but I want you to know, whether you pay anything or not, you know I will still do all I can for you on this job."

Now, subsequently money was paid, the first payment by Brewster as an advance for Killmer, and repaid to Brewster—the money of the Mason-Hanger Company. The other two payments were made directly by Mr. Killmer, I think he testified, to Mr. Bove.

[fol. 832] Now, if it please the Court, under the simple reading of the statute in this case, applied to that evidence, remembering—I am not forgetting the testimony of Brewster, and I know at this time it is no time to discuss the credibility of that testimony—Brewster testified that he went there, and denies that he went as the emissary of Killmer. But Killmer is the man, the officer of the company whose property is extorted; his company paid the money; he is the person who was the officer of that company; the other fellow was only a subcontractor on the job, undertaking to do something that Killmer wanted him to do. And so far as that count is concerned, leaving aside the broad question of whether on any of these counts the statements made by either of the defendants at the time money was requested, on those counts in which they requested money—leaving aside that for the moment, but considering specifically this count, and then adding to it the fact that even the words recounted by Brewster would not constitute threats, oral or written, to do unlawful injury to the property of Mason & Hanger Company—I submit to your Honor that upon this count too, there should be——

The Court: Count 3.

Mr. McGeehan: I meant "also"—there should be a direction of a verdict of acquittal on behalf of the defendant Fay.

Mr. Hogan: Your Honor, Mr. McGeehan, I am sorry to [fol. 833] say, does not quote the evidence correctly. There certainly is testimony to the effect that there was a discussion between these two witnesses with respect to book rates. Mr. Brewster states unequivocally that that was the business of Mason & Hanger, and he did nothing more about it. Mr. Killmer says that Mr. Brewster engaged to do something about it. Mr. Brewster testified that he went to the Commodore Hotel, and that the defendants Fay and Bove said to him, "We want $12,000 from this firm, and if they pay it, they won't have any labor trouble. Will you speak to Killmer and tell him that is the message from us?"

Mr. Killmer says that Brewster told him, "The boys want $12,000." Mr. Killmer says, "That is a lot of money, I don't know whether my people would stand for it." Mr. Brewster testifies, "Miles, you better talk it over, it's a good thing not to have any interference on the job." Both witnesses were asked if there was any discussion with respect to rates at that meeting. Mr. Killmer and Mr. Brewster emphatically said that there was nothing. And Mr. Killmer was asked, "Why did you agree to pay it?" And he gave the answer, "It had nothing to do with rates, it had nothing to do with the previous conversation with Brewster, which evidently was abandoned at that time. Even if Killmer were willing to pay $5000 for rates, he never got a chance to express it; Brewster never got a chance to express it; they went there, and were met with [fol. 834] a demand for $12,000, which is something else entirely, and that something else entirely was to avoid labor trouble.

And with respect to labor trouble, there is nothing hazy or indefinite about it. All these witnesses have testified that the bulk—in some cases ninety per cent of their labor—came from the two unions dominated by these individuals. So when these individuals said, "Pay us, and you won't have any labor trouble," this was the source from which labor trouble could be expected. They did expect it from that source, and it seems to me academic, legalistic, theoretical, to say and to argue that the form of words were not positively asserted, because there are certainly dozens of cases, and I am sure they appear even in the annotations, to the effect that the form is not important; and if it can be found that the natural result and effect of the demand

was to convey a threat, then the mere form of words would be immaterial.

The Court: You want to be heard?

Mr. Polakoff: Just an additional point, your Honor, involving the Mason & Hanger count. If your Honor will recall, the District Attorney asserted that Brewster was the agent of the defendants. Brewster related a conversation between Brewster and Killmer, not in the presence of the defendants. If I may refresh your Honor's recollection, I am referring to the occasion when Brewster said that after his conversation with Fay and Bove in the room, [fol. 835] the defendants told him to go outside and talk to Killmer. I move to strike Brewster's testimony concerning his conversation with Killmer, not in the presence of the defendants, on the further ground, or on grounds additional to those heretofore urged before your Honor, that Brewster on that occasion was an accomplice, a co-conspirator; he was acting, according to the prosecution's theory, in that instance, for and in behalf of the defendants, with full knowledge of what their demands were. Therefore, he would become an accomplice as pleaded in the indictment, or co-conspirator—that the defendants "and others" extorted money.

Your Honor will recall that a motion for a bill of particulars had heretofore been made, and your Honor had rendered a decision to the effect that the prosecution furnish the defendants, five days before the commencement of the trial, with the names of any co-conspirators concerning whose acts or declarations they intended to offer testimony. Your Honor will recall that the prosecution has stated that there will be no proof as to the acts or declarations of any co-conspirator. Therefore the prosecution was barred from offering any acts or declarations of a co-conspirator. I therefore move that that testimony be stricken.

DENIAL OF MOTION TO STRIKE OUT CERTAIN TESTIMONY

The Court: Denied.

Mr. McGeehan: May it be noted as making the same motion, your Honor, on behalf of the defendant Fay?

[fol. 836] Mr. Polakoff: And may it be noted that motions for a directed verdict of acquittal are made on behalf of both defendants?

The Court: Yes.

MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNTS 1 AND 5—DENIED

Mr. McGeehan: I now move, your Honor, for a directed verdict of acquittal on behalf of the defendant Fay on Count 1 of the Indictment, on the grounds that the proof on that count is insufficient as a matter of law to warrant conviction, and that there is no evidence to establish the allegations under that count in the Indictment. That is the conspiracy count.

The Court: Denied.

Mr. McGeehan: I move for the direction of a verdict of acquittal on behalf of the defendant Joseph Fay on Count 5 of the Indictment, on the grounds that the proof on that count is insufficient as a matter of law to warrant a conviction; and secondly, that there is no evidence of the necessary elements in the crime as defined in the statute, with particular reference to any evidence of any threat made by the defendant to do unlawful injury to the property or person, of any person or corporation, and that there is no evidence to establish that any money paid was paid to this defendant, or any money paid to anyone, was paid as the result of fear induced by threats within the meaning of the statute.

The Court: Denied.

MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNTS 6 AND 7—DENIED

Mr. McGeehan: I move for a direction of a verdict of acquittal on behalf of the defendant Joseph S. Fay on Count [fol. 837] 6 in the Indictment, upon the same grounds as urged under the motion for Count 5, and on the grounds that the proof on that Count No. 6 is insufficient as a matter of law to warrant a conviction of this defendant.

The Court: Denied.

Mr. McGeehan: I move that your Honor direct the jury to render a verdict of acquittal on Count 7 of the indictment, on the grounds that the proof on that count is insufficient as a matter of law to warrant a conviction and on the additional grounds urged on the motion with respect to Count 5.

The Court: Motion denied.

Mr. Polakoff: May all the motions be deemed to apply to both defendants?

The Court: Both defendants; and an exception for both.

Mr. Polakoff: Exception is allowed to both of them.

Mr. Hogan: May we approach the bench, your Honor?

The Court: Yes.

(There was a conference between Court and counsel at the bench.)

The Court: Bring the jury in.

(All the jurors and the two alternates resumed their seats in the jury-box.)

The Court: Members of the jury, you have observed, counsel on both sides proceeded with remarkable speed in the presentation of their proof. The People have finished their proof, and the defendants will commence the introduc- [fols. 838-939] tion of their testimony next Monday at 10:00 o'clock, so we are about to take a recess until Monday morning at 10:00 o'clock.

Please during that time remember the admonitions, not to discuss the case with anyone, nor permit any discussion in your presence or form any opinion about this case. You have heard only one side up to the present time. Keep your minds open until you have heard all the case, the arguments, and the law, before you make up your minds on any matter connected with this case.

Recess until 10:00 o'clock next Monday morning.

The Clerk of the Court: Bail is continued on both defendants.

(Whereupon an adjournment was taken until 10 A. M., until Monday, March 12, 1945.)

[fol. 940] (There was a conference at the Bench between Court and counsel, off the record.)

The Court: The evidence is closed, members of the jury, and the counsel will commence their summations tomorrow morning; so please keep your minds open. Do not form any opinion or express any opinion, or listen to any discussion, or discuss the matter among yourselves. Recess until tomorrow morning at ten o'clock.

The Clerk: Bail is continued on both defendants.

(An adjournment was taken until 10 A. M., Tuesday, March 13, 1945.)

[fol. 941] Room 1530, Criminal Courts Building, New York

Tuesday, March 13, 1945, 10 o'clock A. M.

Trial Continued

(All jurors, the two alternates, and both defendants were present.)

(The jurors and the alternates were excused from the courtroom while the Court heard motions of defense counsel, as follows:)

MOTIONS FOR DIRECTION OF A VERDICT OF ACQUITTAL

Mr. McGeehan: May it please the Court, I desire at this time to move for a direction of a verdict of acquittal on behalf of the defendant Joseph Fay, upon each of the counts in the indictment, upon the same grounds as to each of them as were urged upon the motion at the conclusion of the People's case.

DECISION ON MOTIONS FOR DIRECTION OF VERDICT OF ACQUITTAL

The Court: That is denied, except as to the fourth count, which is dismissed; and the Court will direct a verdict at the proper time on that count.

Mr. McGeehan: It will not be necessary for me to make a separate motion on each count, I presume.

The Court: And also on the Seaboard count, the Court denies the motion to dismiss, but will take away from the jury the consideration of extortion and will submit an attempted extortion on that count.

Mr. McGeehan: May I have an exception to your Honor's ruling?

The Court: Yes.

Mr. Polakoff: The same for the defendant Bove; and, in addition thereto, your Honor, I move to dismiss the con-
[fol. 942] spiracy count and for a directed verdict on that count, on the second count, on the ground that no overt act has been proven within the County of New York, within the Statute of Limitations.

The Court: Denied.

Mr. Polakoff: Exception.

The Court (To Mr. McGeehan): Do you make the same motion?

Mr. McGeehan: The same motion, if your Honor please, and an exception.

The Court: Denied. Bring in the jury.

(The jury and the alternates returned to the courtroom and resumed their seats in the jury-box.)

Summation on Behalf of Defendant Fay

(Mr. McGeehan summed up the evidence to the jury in behalf of the defendant Fay, as follows:)

Mr. McGeehan: May it please your Honor, Mr. Foreman, lady and gentlemen of the jury: I can't embark upon the duty that devolves upon me at this time, to sum up this case, without first expressing my very sincere appreciation of his Honor, Judge Munson, for his patience, kindness, and fairness during this trial, and for the courtesy and gentlemanliness of the District Attorney and his assistants in the presentation of this case, and for the assistance of my associates in this trial, in sort of guiding me throughout the somewhat unfamiliar paths of the New York practice, which, as I said before, I am not too familiar with; and I also want to express to you members of the jury my very deep appreciation for the constant attention with which you have listened to this case and all of the evidence that has been presented.

It has confirmed in me my feeling, expressed at the beginning of this trial, of confidence that this case would [fol. 943] be decided upon the issues, upon the evidence, upon the law as given to you by the learned Court; and I have had at no time, at the beginning of this trial or during it, the slightest feeling that any prejudice that anyone might or might not have, favorable or unfavorable, toward any of the witnesses or the defendants, would influence your verdict in this serious case. Because I have believed and always will believe that in the solemn trial of a criminal case, where the issues involved transcend, perhaps, any other issues tried by courts—because in criminal cases the liberties and sometimes the lives of men are involved; and, therefore, the law has thrown certain cloaks of protection around citizens who may be presented upon an indictment, we may never know when. The law, the criminal law, has given to every defendant certain, specific rights when he comes into a court to be tried, and has placed upon

the jury certain duties and obligations and rights in the consideration of the issues that may be presented: And the Court, I think, will charge you at the end of this case, first of all, that every defendant is presumed to be innocent, at the beginning of the trial, throughout the trial, and up to and including the time that you deliberate, and until you reach a verdict in the case. And that presumption of innocence is not destroyed, changed, or affected by the fact that he has been indicted.—The indictment is a mere accusation, a charge, and places upon him no burden. It does not constitute evidence, it places no burden upon him to prove his innocence affirmatively in a case: The burden of proving the case at all times is upon the People, and [fol. 944] because it is a criminal case that burden is satisfied, not like in a civil case by a mere preponderance of the evidence, but the evidence must be such as to prove the specific crime charged against the defendant, beyond a reasonable doubt. That is the burden that the People assume in presenting an indictment; that is the test you members of the jury have the duty to apply, collectively and individually, in reaching a determination on the facts in the case, which is your sole province.

The Court is the sole judge of the law; he alone gives you the law that must enter into your application of it to the facts which you may find. And you are the sole judges of the facts; and in determining them, the collective wisdom, experience, and judgment of twelve jurors is exercised, not merely in hearing the evidence and listening to it and accepting any word testified to upon that stand as verity. Oh, no; a jury has the right to determine the credibility of witnesses, to motives that may actuate a witness in any part of his testimony, his manner upon the stand, whether he is frank and open, or whether he is evasive, whether his answers bear the test of probability, whether there is some reason for his testifying as he does, which you find may affect the credibility to be given to a witness. And so, throughout the trial, all that takes place leads to and is directed to the ultimate duty that will soon devolve upon you to determine the question of the guilt or innocence of the defendants, by the test whether the People have proved the charge they have made, beyond a reasonable doubt, against these defendants.

Now, that brings us to a question of what, specifically, [fol. 945] is the charge in this case. What are these two men accused of in this indictment, which indictment must be proved in the manner that I have stated? The accusation is very lengthy, it contains a total of seven counts. Six of the counts allege the crime of extortion of money—not the mere receipt of money—and, as I said to you in the opening, that there will be evidence, and I stated to you at the very beginning of the case, there will be evidence that money was paid by some of these contractors to the defendants, and that that is not the issue in this case at all, in and of itself. The issue is whether or not that money was extorted—extorted in violation of a specific statute, a part of the Code of the State of New York, which makes the crime of extortion consist of and depend upon the use of force or fear—fear induced by threats made by the defendants, threats written or oral. And what kind of threats? Threats to do unlawful injury to the person or to the property of the corporation or person paying such money.

That is the charge; and I think the Court will charge you that the mere receipt of the money by labor officials from contractors, is not a crime under the laws of the State of New York, by the person receiving it, unless it is extorted in the manner that I have described and which the statute prescribes.

Now, that being the situation, I stated in the opening that the issue in this case—the one issue, the ultimate issue, the thing you have to decide, is whether or not these defendants extorted this money or such moneys as were received from the contractors, whether they made threats, whether they put those contractors in fear by threats ex- [fol. 946] pressed, to do unlawful injury to the property of those contractors, and that the money was paid by reason thereof.

As I said then—as I think I said then, that while you would hear evidence of money being paid, the issue in this case and your decision cannot rest upon whether you approve or disapprove of contractors paying money to labor leaders under these circumstances, or whether you approve or disapprove of labor leaders receiving money under the circumstances shown in this case, but whether or not it was criminally extorted by threats, putting the payers in

fear—threats to do unlawful injury to the property of the payers. I said then, and I think I can repeat now, in reference to it, there would be no evidence in this case that any threats were used or made, and therefore there would be no evidence that the crime of extortion was committed.

Now, members of the jury, I would like to read to you one count in this indictment, which is a sample of six other counts in it, except that different names and different amounts are used, to show you what the accusation is which is made pursuant to the statute in question, and how each one reads, because they are copies of each other, except as to the dates. The first count in this indictment charges a conspiracy—a conspiracy between Fay and Bove to commit a specific crime, the crime of extortion. So that, while a conspiracy is charged as a different sort of offense, the object of it is the same type of offense of extortion as in the substantive counts of this indictment; and therefore, it brings us back precisely to the same question of whether the facts, the proof, the evidence, establish extortion as being the object of whatever actions were taken by Fay and Bove.

[fol. 947] And so I won't read that extremely lengthy conspiracy count, but will read the second count, which charges specific extortion in connection with the Seaboard Construction Company. In that count it is charged:

"And the Grand Jury aforesaid by this indictment further accuse the above-named defendants of the crime of extortion, committed as follows: The said defendants, in the County of New York, from on or about April 1, 1938, to on or about July 1, 1942, wrongfully, wilfully and extorsively obtained the sum of approximately $125,000 in currency of the United States of America, the property of the Seaboard Construction Corporation, a corporation, from Harry F. McLean and Louis R. Perini, officers and agents of said corporation, with their consent, by the wrongful use of force and fear, induced by threats of said defendants to said Harry F. McLean and Louis R. Perini, officers and agents of said corporation, to do an unlawful injury to the property of said corporation, by"—

I would like to interrupt here and say that the rest of what I read refers to the threat to do unlawful injury, by doing so and so and by doing so and so—you will follow it

as I read it, because it is lengthy and there are a number of alleged threats here, which I will continue to read:

"To do an unlawful injury to the property of said corporation, by unlawfully and corruptly fomenting and declaring strikes among the employees of said corporation; by unlawfully and corruptly placing picket lines in front of and near the places of business of said corporation; by unlawfully and corruptly using their power to prevent said [fol. 948] corporation from entering into contracts with the International Union of Operating Engineers and the International Hod Carriers Building & Common Laborers Union of America, and other labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions; by unlawfully and corruptly using their power to prevent said corporation from employing members of said labor unions at prevailing rates of wages; by unlawfully and corruptly using their power to prevent said corporation from employing efficient, skilled, and competent workers; by unlawfully and corruptly using their power to prevent said corporation from receiving efficient, skilled, competent, and productive effort from its workers; and by otherwise unlawfully and corruptly hindering, impeding, and interfering with the conduct of the business of said corporation."

All of those things allege that these defendants threatened the Seaboard Company to do such things. Now, just in passing I want to point out to you that on that particular count all of those allegations as to threats, all those statements that I have just read to you—I don't know what they were founded on or where they come from—they must have been conceived in the mind of whomever drew this indictment to include and contain every possible, imaginable type of threat that might conceivably be made, under varying conditions, by a labor leader to a contractor—not based upon any evidence, not based upon any facts, not based upon any proofs that would be used in support of this count at all, but the general allegations or the specific allegations that I have read to you.

[fol 949] Now, what kind of proof do they offer under this count, just as a sample? First of all, where they allege that the sum of $125,000 was obtained, the property of the Seaboard Construction Company, from Harry F. McLean and Louis R. Perini, there is not a word of evidence in this case

that that money or any part of it was ever paid by McLean or Perini or anyone on earth to Fay or Bove or to anyone on earth. It is bereft completely of a single word of evidence of the payment of any money.

Secondly, there they charge that threats were made. The evidence is completely bereft of any evidence whatever that any threat was made to anybody by either of the defendants, of any nature whatsoever. Certainly, no evidence that threats such as are described here were made, because there isn't the slightest evidence that any threat was made or anything said about this subject, except in Perini's testimony, where he says that he was told by Bove that they want $125,000 from the Seaboard Company and wanted him to talk to Mr. McLean. And the testimony of Perini is that he told that to McLean, on one occasion he introduced McLean to Fay, but he went away, did not hear any conversation, does not know what was said, does not know that anything was done whatever, except, as the months and apparently the years went by, he would run into Fay and Fay would ask him, "Where is McLean?" Well, McLean would apparently be all over the world. On one occasion you will remember he said, "Well, Mr. McLean is on a trip around the world."

So that that count, as a sample, contains not the slightest proof that any money was paid, any threat was made, that Mr. Fay even heard Bove ask for the money or a sum of [fol. 950] money from the Seaboard Construction Company. The only evidence as to Fay is that in the conversation that Mr. Perini testified about, that later on Fay joined in. He does not say Fay heard Bove say that he wanted to see McLean or wanted to get $125,000 from the Seaboard Company, does not say anything regarding Fay excepting—and this is the only shred of mention of Fay in connection with this—that he met Fay in Florida, elsewhere, and Fay said, "Is McLean around?" Or "Where is McLean?" Now, on that this accusation, this count of the indictment, is predicated, apparently. And it is so completely and absolutely without the slightest evidence, not only of some of the elements but of all of the elements constituting the charge of extortion, that it is a fair sample of some of the evidence in this case, which I will advert to in more detail later.

Now, that count is repeated in six total counts. In the third count there is contained the same language, except

that it speaks of property of Mason & Hanger Company and alleges the extortive obtaining under the same threats of $36,000, the property of Mason & Hangar Company, from Miles Killmer and Wiliam J. Brewster, officers and agents of said corporation. Well, the evidence does not show that Mr. Brewster was any officer of that corporation, and he was not. He was a sub-contractor, you will recall, under Mason & Hanger. But Mr. Killmer was an officer of Mason & Hanger Company, and Mr. Killmer took the stand and he testified that his company paid $36,000 to Messrs. Fay and Bove,— or to Mr. Bove, at times, by appointments made by Mr. Fay, so I say, "Paid to Mr. Fay and Mr. Bove."

[fol. 951] But, Mr. Killmer, the officer of that company—the man who testifies to the circumstances and conditions under which he paid it—did he testify that he paid it because he was in any fear? He did not. He was not even asked the question. Did he testify that he paid it because of any threats of any sort made by Fay or Bove? He did not. On the contrary, he testified that before he paid the money, at the time he discussed it to the extent that he did discuss it with Fay and Bove, or Fay, in the hotel that he came to when summoned by Brewster—he says to you, very frankly, before he paid any of this money, Fay said to him, "Thank you, Mr. Brewster, for your contribution; but I want you to know that I would do everything I can for the job, anyway; whether you pay it or not." Words to that effect. Killmer so testified.

So that the man who pays it, the officer of the company, says that when he paid the money he did not testify that he paid it through any fear, within the definition of the statute of extortion or the charge in this indictment; he does not say he paid it by reason of any threats. He goes further and he tells you how he came to pay it; and he alone—and I will point out to you later why he alone—has been honest and truthful in this case. He says, "Before the money was discussed or I went to the hotel room, Mr. Brewster and I were discussing the matter of the new job of the Mason & Hanger Company, were discussing Brewster's sub-contract, and we were discussing matters about labor, especially at that time the question of what rates we would have to pay, whether we could get the job done under what was called the book rates or whether we would have to pay what is [fol. 952] sometimes called letter rates, or somewhere in

between;" and Killmer and Brewster both agreed that it would be well if they could get the then prevailing book rates to be thus used.

And they discussed it, and Brewster said, according to the testimony of Killmer, "I think I can arrange that." And Killmer says to Brewster, "Well, will you undertake to do so?" I am not giving his exact language, I am giving the substance of what Mr. Killmer's testimony was. And Brewster says, "I will." And Brewster says to Killmer, "How much do you think it would be worth and how much do you think we ought to pay?" And Killmer says, "I think $5,000 a year ought to be enough." And Brewster says, "So do I."

And Brewster then goes out to carry out his undertaking, to go to the labor leaders to discuss the matter of paying money to them, the idea of which was born in the minds of Killmer and Brewster; and Killmer frankly says so. And they go out—Brewster goes out, and then Brewster calls Killmer and says, "Meet me in a certain hotel room," and that is how Killmer came to go there.

And when Killmer gets there, he knows what Brewster had gone for, and he meets Brewster in the outer room, and Brewster says, "They want $12,000 a year." Just that—"They want $12,000 a year." Of course, Killmer knew and Brewster knew—he knew what he was talking about—they were talking about the matter that they had planned, to approach the labor leaders for certain advantages and benefits, through a long job involving millions of dollars, that they hoped they might get, not by obtaining defendants' loyalty [fol. 953] to their unions from the laboring men, but benefits that they could get, to the advantage of the contractor, on the entire job from time to time, and which they did get.

So I say, members of the jury, this is another sample count. I have not intended to go into details on this for the present, but it is another sample count, where the facts testified to by a People's witness—the man who paid the money—is diametrically opposite to the theory of extortion or the idea or the proof of extortion.

Brewster does not testify to the same effect. These two State witnesses are put on the stand—People's witnesses are put on the stand, and they are like the Kilkenny Cats, destroying each other, one testifying in that direction, the other testifying in the other. Brewster, following the path that certain of the other contractors followed—to say and stick

to it as far as possible—said, "I deny that I offered the money to the labor leaders. I deny that I went to them. I claim they asked me for it. I claim that I did not offer it to them, but they demanded it. And I paid it so that we would have a smooth job."

He did not say anything about paying anything for any reason on the Mason & Hanger job. He paid the first $12,000 at the request of Mr. Killmer, and got it back from Mr. Killmer, and he was asked no question regarding that. But on his own sub-contract and the separate contract of the Brewster Company, he said he paid that money so as to have a smooth job and not have any labor difficulties upon the job. But he said that, why? He said it for the same reason that the other contractors said it, a reason that appears as clear as that I am standing here, addressing you. I am going to try to show that to you, before I forget.

[fol. 954] Going back to the beginning of this picture, we have this huge—huge, even for these great, national, contracting firms—a several hundred million dollar project, that these giants of the industry wanted to get, bid on. They amalgamated, they formed substantial groups, and one of the groups was the Associated Contractors; the spearheads of it were Walsh & Company, the big contractor that was building the East River tunnel; Shea, who has one huge contract on this job and goes into the combination to get another; Kaiser, whose name is familiar to us all, in enterprises all around the country, but apparently not active individually in the prosecution of them. Giants in the heavy contracting business and in the financial world. And these men decide to get contracts on this huge job,—the Associated contract $21,000,000 or $22,000,000, other contracts all in the tens of millions. I shouldn't say all of them—some of then $11,000,000, 15,000,000, the Mason & Hanger contract 15,000,000 dollars. And these contractors, especially Walsh and his associate Mr. MacDonald, and their associate Mr. Small, they knew they were going into a big thing; they were deeply interested. The People brought out the amount of bond, the amount of deposit. They were interested also in the amount of profits, the salaries, the bonuses, the dividends, naturally. And in a huge contract of that sort, huge amounts were at stake. And these men, knowing that this would extend over a period of five or six years, knowing that it was tunnel work, knowing that the labor supply and labor relations were important, all important to them, and Walsh

and MacDonald and the others having had a bitter [fol. 955] experience in the East River tunnel job, did not want it repeated. They did not want to run into it again. They did not want a job up here, like the one down there, with trouble, stoppages, strikes, jurisdictional disputes, no control by any International over Union 147, the Sand Hogs Union, which is not some bogey invented in this case.

Mr. Walsh admitted on the stand—reluctantly, but he admitted it—that they did not want to do business with the Sand Hogs Union on the aqueduct job. Mr. MacDonald admitted the same thing, and he reluctantly admitted that he probably did say to Fay, when he first met him, that under no circumstances would they, or did they want to, deal with Local 147 on the aqueduct job. That is what they feared; that is one of the things that they wanted to provide against. And they also wanted to provide for the obtaining of the affirmative and constructive assistance of a man whose standing with the contractors, with the labor unions, locally and nationally, with the rank and file, with other officials, a man who was known to be fair and decent and honest, someone who could prevent wildcat strikes, unauthorized strikes, demands for more money after a local union had signed for a given rate—all the headaches that lead to more serious trouble. They wanted someone right from the beginning to advise them, to plan their labor situation, and to control it. And whom could they better select that Joseph Fay, whom they all knew—all these contractors knew well, trusted—who had the reputation that you heard brought out in this courtroom, a tribute that would not be paid to a man who did not in character deserve it.

Do you believe that men, such as you saw take the stand—[fol. 956]—I think, 12 of them—men at the heads of the biggest construction companies in America—you heard them describe their accomplishments, their business—from New Jersey, from New York, from Washington, they came here—came here to speak for Joseph Fay, a labor leader whom they know for years, whom they have dealt with on big jobs, whom they have discussed in their association meetings, of the Contractors Association of New York, of the Contractors Association of New Jersey, officials of both of which have come here.

When those men come here and testify for Fay—when he is on trial, accused so unjustly of this crime laid at his door—when those men come in here and take that stand,

testify as they did, they are telling the truth. They, knowing Fay, say that his reputation for honesty and fair dealing —those words are clear and white—are of the highest. And they come here and say it, in spite of the fact that he is put on trial in this case. They don't hesitate to stand four-square to the world and say what they think of him. And I say, every one of those contractors who come here for the reason I am going to point out to you, to testify against him, in their hearts they know that he never was unfair, that he was helpful; as two of them blurted out on direct examination? "He always helped us when we asked him."

Did he ever call a strike that you have heard any testimony of in this case? Did he ever hold up any contractor, any of them, on any job? Did he ever justify any contractor to believe that he was capable of using his power as a labor leader to destroy their property, their job, and to use it for blackmail or extortion or whatever you want to call it? No. [fol. 957] Not a word of suggestion of any such thing in all his years in labor, and not a word to contradict the testimony you heard of his good reputation and his good character.

This case, this indictment has been pending two years since it was returned; and in that length of time, if there were a man—a contractor or anybody—even the fellows who came here and testified to save their own skins—not even they or anyone has come into the courtroom to say that his reputation was bad.

And so I feel justified in saying that these men who came here and told you that they paid this money because they feared or thought that there might be labor trouble if they did not, had a very definite reason for doing so—a clear and understandable reason, that they hedged and hesitated on, and fenced, but it came out. I say, members of the jury, that they paid money for assistance. Walsh & Company and the Associated, all big interests, did not want—and they admitted under oath—to do business with the Sand Hogs, because they had trouble. They did not admit that before they saw Fay and Bove representatives of the Sand Hogs had told them that they not only wanted this job, the union contract on the aqueduct job, but if they did not get it there would be trouble. And they knew what that meant; it meant a strike on the East River job. Oh, when Mr. Walsh tried to hedge on that, he said, "Well, other contractors had No. 60 there when we were doing this." But I

said, "You knew 147 had the contract with you on the East River job?" And he said, "Yes." And I said, "You knew that you were in a different position; they had you, in effect, [fol. 958] by the throat; they could strike on you if you did not hire them up here, they could tie up your $20,000,000 job down there and bring those men up and also tie up your other $20,000,000 job." He admitted they were in a different position in that respect, and that he did not want to do business up here with them; and they knew that the reason they could not control them down below was because they had a contract with Local No. 147, not countersigned by the International; and what they wanted was advice as to how to be protected up here, in the event of trouble with 147, in the event of a strike there and the use of the men for pickets up above, that that strike would not be a lawful one within the rules of the International Unions, that it would not be recognized, that union men could go to work there and fight these fellows if they do it. And the threats that Kenny testified to yesterday—once one of the Sand Hog groups—those threats were made to MacDonald and they were made to Walsh, and those threats were carried out. But Fay and Bove in meetings—three, four hours at a time, even MacDonald and Walsh testified—they were not talking of a holdup, they were discussing ways and means and plans for the joint operation and assistance on this huge job, to cover the years ahead with vast supplies of labor. Kenny testified to those threats, and that came to pass. But when it did happen, what Fay and Bove had arranged—the signing of the contract with not only Local No. 60, but the counter-signing of it with the International Union, of which Bove was an official—resulted in the non-recognition of that strike when it was called, resulted in the union men on the job up there going, as they seemed to call [fol. 959] it, "through the picket line," and in not recognizing the strike, and going so far as to fight it—physically fight it, with hundreds of men brought up here at the expense of Fay, and not at the expense of the contractor, to keep the job going, to keep the men coming in, to lick that strike—which they did, in around two weeks, against 800 or 1,000 men up there to destroy the continuance of that job—fought in court by an action brought by Bove for an injunction against this union and a member of the American Federation of Labor, Local No. 147, and under Bove's own International. They fought it, and they did what these

contractors wanted, all the way through. They lay the foundation, as I say, by those contracts being signed with the International and the Local; and through this arrangement, all these contracts involving a very huge sum, were enabled to proceed smoothly, on time, finish within the period or before time, and no troubles whatever except that which was expected, the war of the sandhogs union because they wanted the job and wanted it at compressed air rates—a ruinous amount for them to pay on non-compressed air work—some of the work not being under compressed air, but the sandhogs claimed all tunnel work and at compressed air prices.

So that it was a matter of avoiding trouble, avoiding jurisdictional disputes with any small union; and, because, the trouble occurs among the rank and file, among the lesser officers—quarrels about which union has the right to certain jobs and certain jurisdictions—and when a man of substance and influence with both the contractors and the unions was supervising the situation, looking out for the [fol. 960] union men because it was to the benefit of his union and Bove's union, which had the contract and was entitled to have it up in that district, it was mutually to the advantage of the contractors and their unions that that be done.

And these men, throughout, gave to the contractors every service they were asked to give: maintained a smooth, peaceful job—not against any threat of strike by them, but by anyone who might do anything. And the funds that they were given—do you think the contractors cared to whom they were distributed, or when or how, or whether to prevent trouble or cure trouble when it occurred, or to fight trouble if necessary? Because the one instance that you have seen—a couple of hundred or two hundred and fifty men for a month or a substantial part of it, being paid and fed and housed in the vicinity of this strike, is an expensive proposition, and is only one item. And the other items through three or four years are such that the contractors did not care what was done; but they were willing to use Fay and Bove to handle the labor situation as I have said, and they were pleased and they were satisfied and they were happy, and they made no complaints, members of the jury, they made no complaints. They were not people, robbed, coming to the police or the District Attorney and making complaints, "I had a gun at my head and had to pay

some money," figuratively. Oh, no. The District Attorney himself, Mr. Hogan, very frankly said to you that this did not begin by these men coming in. They were brought in, and they were less than frank—or I don't know what word to use—but the impression was they were not truthful, and it had to be pulled out of them.

[fol. 961] Well, you have seen a little more about that. They had the books, they were investigating for six months before; they had to go to Providence to question Mr. Walsh and Mr. MacDonald, and they found Mr. Perini out in Pennsylvania, and he told you frankly on the stand he was evading and eluding them, and he was worried when they finally caught up with him in the western part of New York State. All of them, with their books garbled and falsified; all of them ultimately questioned, brought in; and before they came in to be further questioned they answered questions first. The lawyers went there the first time, when they were questioned in Providence and Pennsylvania, wherever they sought them. So they knew, members of the jury, that the District Attorney knew they had paid money to Fay and Boye, and they knew their books had been examined and inspected, and they immediately ran to their lawyers.

Why? Every one of them consults his lawyer immediately, and from then on none of them ever appeared on the numerous times they were brought in to the District Attorney, to the Grand Jury, without a lawyer. Always their lawyer was right with them all the time. Why? For them to be witnesses against someone who had done a wrong to them, had stolen money from them? For them to just tell what happened to them? Oh, no. They consulted lawyers and kept them with them because they had done something that they tried to conceal, that they knew when they consulted the attorneys, if the truth were told, constituted a willing, voluntary payment by them, which could make them, the payers, liable to prosecution under the bribery statute, which specifically provides that it is a misdemeanor [fol. 962] for contractors to pay money or offer money to labor leaders for various purposes, one of them being to prevent strikes by any union. In other words, if it was to prevent a strike by the sandhogs, they could be charged with the crime of bribery.

Now, presumably, the lawyers advised them of the law. At least two of them admitted that the statute was read to them—or at least, one said it was read to him, the other

knew the statute. And they were all advised—MacDonald, Small, and Walsh in a group—the lawyer was here from Washington—but he tries to tell you it was a coincidence. And it was just a coincidence, when he went before the Grand Jury, that his lawyer was there.

Why, these men are all wealthy men, obviously; they are big contractors, they are able to hire capable counsel and they did. You can bet they knew all about the possibility of their being in trouble unless the story they told took them out of the category they were in; and the only thing that would do that would be to deny they did it of their volition, freely, as money being given by them to the labor leaders, but to claim that they did it through fear.

And that is why these men came here and said what they did. But even their consciences won't let them go very far in that direction—just enough to protect them. And even they don't testify to any threats made against them, within the charges in this indictment; but they do say—some of them—that they paid it because of what was said to them, and it was asked by the defendants rather than offered by them.

Now, when I speak of that, during the course of the trial Mr. Hogan in argument to the Court said something to the [fol. 963] effect that he challenged the good faith of that argument. I think he meant legal good faith. Because there is a statute of limitations of two years that would protect these men against a prosecution for the misdemeanor of bribery. But if the Court charges you upon this subject, I think the Court will tell you that that same statute provides that that does not inure to the benefi of a person while he is outside of the State of New York; and all of these men except Killmer reside outside of the State of New York, so that they were not protected by the statute of limitations unless they were here present here in New York for two years since it occurred.

Now, Small is the exception to that, but Small is tied up with MacDonald and Walsh and goes along with them. Small, who is so scared of the $50,000 that he handled, that he gave it back a number of months later to the corporation, and then started getting $10,000 a year voted to him, to try to further cover it up.

These men, members of the jury, brought their lawyers with them to guide them against possible prosecution themselves if they gave statements to the District Attorney that

did not include some suggestion at least of the element of fear; and the only one who did not do that is Killmer, the resident of the State of New York, who would be not prosecutable by reason of the statute of limitations, as he is. And when they get on that stand and hem and haw about why they had the lawyers with them, it is to conceal that which they knew is so in that regard. When they deny upon the stand that their lawyers discussed that feature with them, I leave it to you as to whether or not they could be [fol. 964] constantly with them each time they appeared, without being advised on the simple code provisions relating to this situation.

And so we have it: Contractors coming in here, giving you a story that I say is incredible on the face of it, is improbable above all, because the man they are accusing of it—or one of the men they are accusing of it—and I speak only for my client, Fay—is a man who has never, under the evidence, stooped to such a thing, whose repute and character does not jibe with that, and which those men would never have done except for the greatest motive in the world: personal fear of disgrace, of possible prosecution or indictment for a crime. And those men also knew that when they were questioned and before they went before the Grand Jury, they could be compelled to testify under this very statute and given immunity if they did. But I ask you whether they would have been permitted to testify if they had not given statements first that would constitute evidence against Fay and Bove, because this investigation—several of them said they knew, and at least one said he was told—was not against the contractors, but against Fay and Bove, and they were asked in as witnesses and to be witnesses against Fay and Bove.

So the door was wide open to them to step in, protect themselves, at whatever cost of the rightness of it, the honesty or fairness of it; and that explains the testimony of certain of the contractors; and they did it, knowing that it wasn't so. They did it, as I say, but they couldn't and didn't go beyond what they thought was just enough to protect them.

Your Honor, I wonder if the jury would like a short recess, sir.

[fol. 965] The Court: Yes; we will take a short recess. And, of course, the jury won't discuss the case or form or express any opinion.

(Whereupon a short recess was taken, after which the trial was resumed, all the jurors and the two alternates and both defendants being present.)

Mr. McGeehan (Continuing): May it please the Court and the jury, I mentioned awhile ago the character witnesses that were produced in this case, and that the People did not call in rebuttal or otherwise into the case any evidence or witnesses to testify to the contrary of that, or to produce any evidence that their reputation or character for fair dealing and honesty, especially as labor leaders was bad—the character of Mr. Fay. But there were questions asked on cross examination that I do want to advert to. Those questions insinuate into the case, not by way of any evidence, not by any proof or sworn testimony, not by anything that you could take to constitute evidence that those questions contain factual matters—but questions that were put to the witnesses. "Did you read in the paper such and such a thing?" And "Did you know that he was indicted for such and such a thing," without bringing out whether the article in the paper was true or not—whether an indictment returned was dismissed or not—without bringing out anything that constitutes evidence that in any way disturbs the affirmative, positive testimony of these outstandingly capable men, who had a knowledge and who were in a position to have a knowledge, of the true reputation and character of Fay as a labor leader dealing with contractors in their enterprises all over the East.

[fol. 966] And so I say to you, that I think I am entitled to ask that you be not prejudiced or influenced in any wise by the content of such a question, not backed up by any evidence whatever. And I ask you not to be influenced by anything you may have read in any newspaper, because after all, we all know that some columnists, writers in papers, make their living by the possession of a vitriolic pen, and that all calumny or vilification of an individual does not constitute evidence that they are right in such vilification. They may equally calumniate the President of the United States or the wife of the President of the United States, or the ancestors of the President, or various persons in Government, upon a basis of an opposition to their political or economic views or situations. I don't mean that any vilification of Fay entitles him to be placed in a category with the noted persons I have mentioned. But I say he is placed

in a category with them by the very articles which call them names, equally as unfair as the names they call him in such articles.

And so that is the reason I believe and am confident that nothing extraneous of that sort will enter into your consideration of the evidence in this case, but that you will judge it solely on the question of whether or not the People have proved beyond a reasonable doubt all of the elements of the crimes that they have charged against these men.

And you have a right to scrutinize not only the quality of the evidence produced by the People, and the credibility of those witnesses, and the weakness of even the testimony that they attempted to give, but you have a right to consider the lack of evidence. None of the books of the Walsh [fol. 967] Company or of Perini, or of any of them, were produced before you, so that we and you may inspect those books and see whether they support or back up the testimony given here—books admittedly falsified—books which may or which may not contain any number of other falsifications, so that there would be no corroboratory effect to be found in those documents. Books of a man like Perini who on the witness stand admits that he was convicted of or pleaded guilty to the crime of defrauding the Government of the United States out of $80,000 in income taxes in one year—the year 1936—and who admits that his books are also falsified for 1937, although he hasn't been prosecuted on the basis thereof. A man who deals in cash to such an extent that he couldn't remember or say how much he paid to Fay when he testified that he had paid some money on the Lincoln job to him. Perini, who comes from Massachusetts, admits he was evading and eluding the District Attorney—admits his books were falsified; admits he has a record of commission of crime; admits that he denied paying any money when he was first questioned by the District Attorney, and who with his lawyer at his side at all times, even during this trial, finally in his wisdom of the ways of prosecutors, his wisdom in trying to protect his devious activities—that man becomes one of the State's witnesses, whom you were asked to believe to the extent of finding a man guilty of crime upon such evidence.

And who is followed by a witness, Brewster, who goes before the Grand Jury three times; who tells you he can't remember whether he told under oath the first time he went

before the Grand Jury that he ever paid any money to [fol. 968] Fay or Bove. Do you believe him? A man of his intelligence, experience, must have been—he consulted counsel in New Jersey, Mr. John Milton of the New Jersey Bar. He came over here three times. I don't know how many times he said he was questioned, but three times he goes before the Grand Jury, and he thinks he adds something each time, but he doesn't know what. And he keeps on saying time and time again, "I don't remember whether I said at the first appearance before the Grand Jury that I paid this money that I say I paid"—"I don't remember whether I said that I paid the money in order to have a peaceful job or anything of that sort."

Do you believe him? Don't you know he knows what he said, and don't you believe he is concealing it? Because he didn't tell then the story he is telling now. And that man who categorically denied that he arranged with Killmer to go to Fay and Bove, and turns it completely around and says they asked him for the money. He never discussed with Killmer going to them to offer them $5000 a year, and they said they wanted twelve. Do you believe that? Isn't that a revelation out of a witness for the State, Mr. Killmer, a specific proof in the case of Brewster that under the influence of the knowledge of the law, and to protect himself, he came before you and he lied in the same manner, for the same purposes, with the same motives as the other contractors did—except that in Brewster's case his associate on the job—one as contractor, the other as sub-contractor—the one for whom he admits he advanced a payment of $12,000—that man comes here as a State's witness and testifies in effect that what Brewster says is the story, is [fol. 969] not true; and that he did say, when questioned by Mr. Moore of the District Attorney's office on one occasion, in the presence of Killmer, that he knew nothing about any meeting at the Hotel Biltmore or Commodore, which Brewster testified to here—Brewster had said in Killmer's presence to the District Attorney that he knew nothing about it, had nothing to do with the arrangements for the payment of any money; said nothing about paying money, or anything about even being at the Hotel Biltmore or Commodore.

Now, members of the jury, in that case it is clear what happened. In the other cases of the contractors it is equally deducible from the general circumstances and facts, and the

law applicable, and their desire to protect themselves, as to what made them do the same thing that Brewster did, in coloring his testimony for self protection at the expense of anybody else, as long as they are safe.

Now, that kind of evidence, the lack of the production of anything corroborative of the testimony of any of these men on the essential ingredient of this charge—any threats of any sort—the lack of any evidence of the doing of anything by either of these men before these conversations took place, such as causing a strike or causing any stoppage—or afterwards doing anything that would create circumstances that might be said, coupled with a specific threat, to give foundation and color and credence to the possibility of fear existing in the minds of any of these contractors. Nothing of that sort in this case, and no attitude of any one of these contractors such as that which would be expected to be there, if against their will, money had been extorted from [fol. 970] them by the putting of them in fear through threats to do something, almost robbery.

Oh, nothing. When they fenegled their books, when they made the false entries, when they handled the cash among the members of the firm, such as the Walsh Company did, such as Perini did—they were doing it for a purpose of concealing for themselves what they did not want to appear.

What other ramifications are in it, I don't know. From an income tax standpoint, I don't know how they acted—from the standpoint of Federal or State income taxes, I don't know. But some sort of a story was given by Mr. Small to the effect that he, after getting $50,000 and turning it over, as he says, to Bove—that the following March, I think it was—this is almost a year later—he gave to the Corporation $40,000, and then he got that back again at $10,000 a year, but not annually, because they stopped for some reason; and the last payment was made, I think he said just last year. It was voted to him under the guise of salary, bonuses, and he says he paid income tax upon that $10,000 a year. Whether the company charged the original $50,000 as an expense, deducting it from their gross income of that year, and again deducted it at $10,000 a year afterward, I don't know. But apparently there would be total outpayments of $90,000 in that transaction. And how they handled the receipt of the 40 which he says he gave, we don't know, because these books are not produced here. We are not able to judge those circumstances. Smith, who

was mentioned here a dozen times as the man who handled the money transaction in turning it over to Small—he wasn't even produced here.

[fol. 971] Perini's books are not here. None of the books are produced here, or any of the records or anything except for certain checks, and they bear on nothing but the question of whether some money was paid—which is not the issue in this case.

Now, members of the jury, I don't want to trespass too long upon your time. You have been patient and kind. But this testimony involves virtually several cases. I mean by that each of these counts constitutes and comprises separate allegations and separate alleged crimes, and I want to advert as briefly as possible to the state of the evidence in regard to those.

With regard to the charge concerning the second count in the indictment—first let me say as to the first count, conspiracy—if what these men did has not been proved beyond a reasonable doubt to have been the crime of extortion, then the conspiracy charge, which must be proven to have as its object the extortion of money, under the same definition of extortion as in the substantive counts, equally fails. And as the consideration of the separate counts involves the proposition of the alleged objects of the conspiracy, I will advert again to the specific counts.

I say that so far as the second count is concerned, with regard to the Seaboard Construction Corporation, that there is not evidence on any element of the crime of extortion there; as I stated previously, no proof that any money was paid; no proof that threats were made in relation to that of any claim or any words except that Bove said to Perini, "We want $125,000 from McLean or from Seaboard on that contract." That is as far as the conversation ever went. There is no proof or evidence on it at all. And [fol. 972] while the Court—if the Court should charge you that on that count you may consider the question of whether an attempt of extortion was made, I say again that there is nothing in the proof under that count whatever that contains any of the elements of the crime of attempted extortion, as the Court will define that in his Honor's charge to you. There is nothing in that but a request which could be, in the absence of any evidence upon it at all—could be not in connection with any design to commit any extortion. And if it were, there would have to be some proof of it,

some evidence of it, something beyond the mention of that sum by Bove.

And so I say that under that count, there is no evidence to argue against. There is no evidence on it. It is almost as bereft of evidence as the fourth count for the Trap Rock Corporation, which I believe the Court will direct you to return a verdict of acquittal upon, because upon that there wasn't the slightest attempt to produce any proof. And I may say this, that with regard to the New York Trap Rock Corporation which allegedly paid the sum of $12,000, that there not only is not the slightest evidence produced before you on that count, but no evidence whatever of the unavailability of any witnesses, or anything of that sort, in connection with it. And while that count will be directed by the Court to be dismissed by you, or you return a verdict of acquittal upon it, I want to point out that it is one of the allegations in this indictment, the same as the allegation with respect to the second count therein, and numerous allegations of various corporations in the conspiracy count about which we have heard nothing whatever. So that the [fol. 973] indictment contains numerous allegations that appear to have not the slightest support from anything in the evidence.

Now, when we come to the fifth count, that involves the Perini allegations, the charges of extortion from Perini of $35,000 in currency. Now, you will recall Perini upon the stand. He testified to a conversation in which Fay asked him for $50,000. He said he refused. He says throughout his testimony that he continued to refuse, and that at no time did he agree to pay that; that after considerable conversation with Bove, Fay came into the conversation and he agreed with Perini that $50,000 was excessive, and that $25,000 or $35,000 was more reasonable. And with regard to that testimony, Perini says time and again, he did not agree to pay it. But later on he found himself paying money. He doesn't say that he had any fear; he doesn't say he paid it under fear. He wasn't asked it, as I recall, in the record.

Nor does he testify to anything that constitutes threats, even if you believed his story. He testifies merely that when Bove was discussing it with him, he said they would give him good men, and that he would have a smooth running job—and words to that effect. And I want to say this before I forget it—that on the testimony of any of the

contractors, none of the words which they say they heard and which they say constituted any inducement to them to pay any money—none of those words—nothing the contractors testified to was that Fay or Bove was feared by them to intend to call any strike, or themselves to do any harm to the property or business or work, or anything else, of the corporation. All of those statements are consistent [fol. 974] with the hope by the contractors that these men, Fay and Bove, if any strikes should occur upon their job by anybody or picketing or interference of any sort, that these men would use their influence, use their ability, to help to protect the contractors and the men who were on the job under the union leaders, from the effects of those things, and to prevent stoppages of work.

Now, that being so, even if you believed the testimony of any of these contractors, there are no threats on the part of Bove or Fay to do any harm; no threats of any sort that they would do so and so if the money were not paid. Oh, Walsh testified specifically there were no such threats. In fact, he said when he was asked whether he had any fear, he was afraid there might be certain things—that there might be stoppages, or there might be strikes upon the job. But he said neither Fay nor Bove said anything to that effect.

So that we have at the end of this case, not only the barrenness of the proof of the heart and the meat of the crime of conspiracy, but any evidence by whatever the People may contend to constitute such evidence, how they can make it come within the specification of the crime of extortion, that there must be threats, verbal or written, to do unlawful injury to the property of the payer of the money, I don't know. But even that weak evidence is of seriously doubtful credibility. It is given by men who had motives to say what they did, extenuating the circumstances under which the money was paid—powerful motives; and their very denial of fears in that discussion is contradicted by the circumstances of their having their lawyers with [fol. 975] them every time anyone wanted to question them about it, or even up to the door of the Grand Jury room.

Certainly they had time to protect them, and they had time to advise them, and they knew the law, and they knew the danger that they were in unless they took themselves out of the category of paying money in such a manner as to come within the bribery statute, which they alone could be

prosecuted for. When I say "they alone," I mean the payers of money and not the receivers of moneys under those conditions.

Now, members of the jury, I don't want to go through—I know how attentive you have been throughout this testimony—I know that you have listened and perhaps have grasped far more in detail than I, the specific evidence of all of these witnesses; that you have scrutinized them; that you are ready to weigh their credibility; that you are going to apply to all of that testimony the test whether it is veracious, whether you could believe it sufficiently to found a verdict upon, involving the liberty of a human being, sufficient to be able to say, "I have no reasonable doubt upon any of the elements of this crime as to threats, as to fear, as to the veracity of the witnesses."

Why, I don't think, members of the jury, that it would be safe to make a wager in money on whether these witnesses are telling the truth upon that subject under those circumstances. I don't think I would want, if it were possible, to have the Omniscience of the Deity in looking into their minds and their hearts and finding the truth within them—I don't think anyone would want to make much of a wager on whether they are truthful in regard to the cir- [fol. 976] cumstances of the payment of the money—whether they were paying it for purposes of their own willingly and voluntarily, and on their own volition and decision—or whether it was demanded from them. But certainly we would not want to wager the liberty of men, the sanctity of a court of law, in seeking to achieve justice in a case, and to apply the rules required to be applied in a case of importance such as this, and I mean importance such as attaches to any prosecution of a man for crime.

So I say, members of the jury, in considering this evidence, in approaching it, I know that you will realize the solemn responsibility that you have undertaken. I know of no function of men in civil life deeply important, serious, no responsibility equal to sitting in judgment on your fellow men. And I know you will welcome from the Court the rules under which you must decide the case.

An umpire in a baseball game would call a strike or a ball, and not give the slightest thought to whether he liked the batter or not; whether he did or didn't like him as a player or as an individual, because the American spirit of fair play, the American spirit of sportsmanship never deviates

from that, when the responsibility of decision is cast upon them. And when it is cast upon them in a serious proceeding such as this, I know that all of the rules of the proceeding will be applied by you, and applied with respect to the questions that you have to decide: The veracity of the witnesses, their demeanor, their hedging on things and denying things that obviously are not correct; a record of conviction of crime, which you are entitled to consider with [fol. 977] respect to veracity; their denial of matters such as that an attorney was here intentionally with them, rather than just accidentally up from Washington, and accidentally up from Washington when the matters were being heard before the Grand Jury; or whether they were consulting the lawyers only to have them tell them to tell the truth. Those are things you can watch for and consider, whether or not there was in their minds the bribery statute and why it was there; and whether they were advised upon it, and whether it led them to say what they did; why they tried to deny the trouble on the job of the East River Tunnel, and the severity of the strike and the pickets that came up to the Aqueduct to interfere with that work.

Was it to evade that which they knew and finally admitted that they talked about on the first meeting with Fay and Bove?—the desire to avoid dealing with the Sandhogs Union, and the services rendered by these men when the threatened strike came, and when the picketing occurred?

Oh, members of the jury, I ask you to give to these men among the other things that are to be considered, the full benefit of the uncontradicted testimony concerning the character and reputation of Fay, because Fay was the man who was talked with, who helped arrange the matters which the contractors wanted to be arranged from the beginning of their jobs; who helped Killmer when this same union which had allowed men to work on his job pulled them off, and Fay replaced them, or attempted to replace them?

I want you to remember that every bit of the picture in [fol. 978] the case is that of aid and help by Fay to the contractors at all times; that there isn't the slightest indication that he was a man who made any practice of demanding money from any contractor on the job. Why, you heard the testimony here—Walsh testified that he had the East River Tunnel job, that he had contracts with engineers; and he was never asked for any money on that job. He never had any trouble on that job from Fay or his union, or

Bove. He had trouble, and lots of it, from 147, which became the enemy of Bove and Fay because they recognized, and had the International recognize Union No. 60, the Local up near the site of the work.

Oh, I ask you, members of the jury, if you don't think that Fay and Bove made enemies in that Union No. 147. You have heard that they sued the International Union and Bove in litigation after they were kept off the Aqueduct job as the contractors wanted, and these unions wanted; after they were fought and licked in the strike by the production of men who battled them physically, and by court action brought by Bove against them up there. And even after they were defeated, even after there was an injunction, they continued to picket; and Fay and Bove had to have men in readiness to keep the work going, and let their men go through the picket lines, because you couldn't tell with the sandhogs when they would be up again in force with their bats and with their rods—I mean iron rods, steel rods, as was testified to by Mr. Kenny.

And so, members of the jury, I don't know how this investigation originally began, but there were enemies of these men right in that union of the sandhogs—this large number of men with their active organizers and business [fol. 979] agents, fought and defeated, and kept from getting all the tunnel work around, at compressed air prices. They resented it. They struck because of it. They picketed this job at the Aqueduct because of it, and they followed with suits against the International Union and against Bove.

And when you remember that in the conversations testified to by State's witnesses, there was talk of money for the boys, which the witnesses said they took to be labor leaders, it naturally would be known, known to the labor unions and labor men, if the contractors were giving money to the leaders of unions, upon a big job of this sort. And I ask you whether or not those sandhogs—that union—are not still trying to make Fay and Bove pay for fighting them, for the benefit of this vast constructive job, and the contractors, upon it.

Oh, members of the jury, I know that it won't be necessary for me to review all the evidence in this case. I know that so far as Perini is concerned, that man so lacks credibility, not only because he was convicted of crime in defrauding the Government, falsifying his return—not only

because he obviously upon this stand was evasive and untruthful, but because the story he tells is inherently improbable, does not ring true—that he refused to pay anything, did not intend to pay anything, but later paid money—found himself paying. And at the end of his examination he was asked, "Why did you pay any money?" And then he says, at the end of it, he paid it because of the statements that had been made, I don't know how long before, by Bove to him.

As to the counts concerning the Associated Contractors [fol. 980] I have dealt somewhat at length upon that earlier. That is linked up with the Walsh Company. As to them above all, it is obvious that these big men, Walsh himself, was head of the Walsh Construction Company, which was in its turn the head of the Associated Contractors, with MacDonald, when they came and met Fay and Bove, spent at the first meeting a number of hours with them that they admitted—that MacDonald thinks three or four hours—that they were planning, together with the labor leaders' and Bove's help that they expected and wanted to receive—that they planned out a method, in advance, of being ready for the strike that was threatened, and that they knew would come, and could tie up the entire job that they were embarking upon; that they went there intending to pay money, because Walsh testified that when he got there—oh, he puts a different complexion on the conversation with Shea before that—he says in effect, Shea told him that Fay had spoken to him about wanting to see Walsh, and to have money paid by him. But that shading of it is in line with the shading, had it been said, that Fay asked for the money rather than they offered the money to him. But here was Shea, interested in a number of big contracts—a partner with the new bidders, the Associated Contractors, and didn't Shea suggest to Walsh and to MacDonald, "Go and see Fay and Bove. I will tell you how you can avoid the headaches and the losses and the troubles that you have had down on the East River Tunnel job. They will arrange so that you won't need to fear the strike threatened down there, and the picketing on this job there. Go and see them."

And they did. And when they saw them, according to [fol. 981] Walsh, he said he did not see why they should have to pay any money—he said he demurred, he refused. Then he goes into a room for 15 minutes, and MacDonald

comes out and offers $100,000. They finally agreed on $150,000, without consulting his associate, without consulting those who had interests in this Amalgamated Company. The decision is made right there.

Don't you think it was a decision of men who came there intending to make an arrangement of that sort, not because it was being demanded, but because it was for the mutual benefit of everyone that had a contract. And when it was done, they were satisfied; they paid it willingly. They suggested and brought up the idea in every instance, and they concealed it on their books for their own self protection. They paid it in cash for the same reason, and also probably because it wasn't new to them to deal in cash in their companies. We would know better about that if the books were here.

These were worldly wise men. These were men who dealt in big things, contracts all over the country, going into new territory to gobble up all the big jobs possible by amalgamations and otherwise. These were not children. These were men of the world, and they were practical men; and they knew as much about Joe Fay as these twelve men you heard yesterday. They knew him the same way, as a constructive, trustworthy, able and fine labor leader, helpful to the contractors and to the constructive jobs to be undertaken, as well as helpful to their men. The men that elect these labor leaders are the ones to judge whether their actions are to their satisfaction. And the contractors who deal with labor are the ones to judge if they are decent [fol. 982] and honest in their handling of those things. And that evidence you have heard. You have heard it from the men whose faces, whose appearance, whose manner shows that they are men who would not come here in the world to stand up for a man in trouble, charged with extortion from brother contractors, members of their own associations, who come before you and tell you that their reputations over the years were good, and that the reputation of Fay is good for honesty and fair dealing.

And under the law, as I think the Court will give it to you, you are entitled to consider that evidence to the utmost. You are entitled to consider that in determining the guilt or innocence of this defendant; and if that evidence alone, taken into consideration with the other evidence in the case, engenders a reasonable doubt in your mind, he is entitled to an acquittal upon that alone, or any other failure

of proof, or any proof that in your mind does not satisfy beyond a reasonable doubt of the guilt of this man. And I say it is important, not only as establishing the improbability of his doing a thing such as he is charged with here, but it is important in making the testimony of the contractors unbelievable, that they were afraid that there might be strikes or other things if they didn't pay. Because there is nothing in this man's record to justify that, nothing in his reputation to justify it. He is too well known, too favorably and too long, to all of these contractors and the officers of the associations, to make it conceivable that they would be afraid he would do anything of that sort.

Oh, no, he was selected by them, selected by them to save them vast sums of money through possible bickerings [fol. 983] between little unions, jurisdictional disputes, demands for wage raises against a contract signed and entered into by unions, or the International.

So I say, members of the jury, please consider this entire picture. Please realize that on the evidence adduced here, the State's testimony is so weak that if it were believed, it does not constitute proof of the crime of extortion, which has as its essence, its heart, its basis, threats to do unlawful injury, which in effect produce a fear in you that makes you pay money.

Where is the evidence of that in this case, if you believe what they say by their testimony, even touching on the fringe of it, incred[illegible] and thoroughly consistent with the theory that they put that fringe on it to protect themselves against danger of prosecution themselves for the misdemeanor, the crime of bribery of labor officials, if they were to tell the truth?

But they paid it in part to help prevent strikes of other unions, because, under that statute, if they pay money to any labor officer to prevent a strike, it constitutes bribery on the part of the person paying the money.

I think they were skillfully guided. These lawyers told them the law. One at least said it was read to him, this statute; another admitted he knew it—admitted after eight or ten or twelve questions in which he hedged on it and finally yes, yes, he is familiar with it. Brewster was familiar with it, familiar with legal or semi-legal terms such as waiver of immunity, which he did not sign, and so forth.

Oh, members of the jury, you represent an institution in the jurisprudence of the country which is perhaps the [fol. 984] greatest shield from time immemorial against unjust convictions or charges preferred of crime. You represent in your verdict the combined wisdom and judgment and conscience of twelve persons. You represent the judges in this case of the facts. You have as solemn a responsibilty as his Honor has, who presides over the trial of this case. And when you come to decide these serious issues, I want you to remember that you are deciding the fate of a human being. You are to determine whether to turn a free man, a man of good reputation, a man of substance and ability and constructive work, from a citizen into a felon. You are to determine by your verdict the awful question of whether a man has committed felonies, crimes against the law of this State. And in deciding that, I ask you and each of you before you enter upon your deliberations, to hear the charge of the Court and to listen with great care, as I know you will, to the law, and consider it in relation to the evidence, and the lack of evidence in this case. In other words, as I said in the opening, all that I will ask in that regard is that at the end of this case, a true verdict you render according to the evidence and the law. And I feel complete confidence that under the testimony and the evidence in this case, the application of that rule and undertaking can result only in a finding on your part that my client, whom I have come here to represent, whom I have known for years in the City of Newark—that the people have not proved the charge made against him in this indictment on any of the counts; that they have not proved beyond a reasonable doubt the elements, and all of the elements, necessary to constitute that crime. They [fol. 985] have produced evidence of payment of money. I am sure the Court will charge you that does not constitute the crime charged at all. That the mere receipt of money by the defendants from the contractors does not constitute a crime; that you, in deciding this case, must determine that question: "Have they proven these specific crimes of extortion, of the obtaining of money by threats to do unlawful injury?"

If the People have not, I know that you will render a verdict in accordance with the law, and in accordance with the evidence, which I feel and believe with all my heart must be a verdict of acquittal in his favor.

(Mr. Polakoff then summed up to the jury on behalf of the defendant Bove as follows:)

Mr. Polakoff: May it please your Honor, Mr. Hogan, Mr. Gelb, Mr. Sarafite, Mr. O'Connor—Mr. Foreman, members of the jury: I find myself in a somewhat difficult and embarrassed position in discussing this case. Mr. McGeehan has made a very able and full summary of the evidence. Repetition is boring. I shall try to avoid it. In fact, within the time limit, I must. However, I have one or two additional thoughts that might enable you to make your minds up as to the outcome of this case.

To my simple and humble way of thinking, the issue here is very, very plain: Did the defendants extort money by threats? If they did, it is your duty to convict them. Did the defendants receive the money from the contractors, paid by the contractors voluntarily for the benefits which the contractors hoped to acquire? If that is the fact, you must acquit the defendants.

And one thing further—if you have a reasonable doubt [fol. 986] based upon all the testimony in this case, then it is your duty to give that reasonable doubt to the defendants and you must acquit them.

Now, how do we judge the issues? One: We have to take into consideration the testimony of the witnesses, not only the spoken words, but the unspoken words,—motive,—demeanor,—personal interest—lack of frankness and candor. No lawyer, at least to my way of thinking, can make a witness change his story, particularly if that story is a false one.

If we are trying to tell the truth about incidents that happened three or four or five years ago—1939—possibly six years ago—we may not remember, honestly may not remember everything that happened. But if we are telling a falsehood, that is so ingrained, that nobody will ever get us to change that story unless—which happens once in a long while—you wrote a letter or swore to an affidavit that some time comes up. By that I mean there is a book on the table, and we all know it is red. If a witness goes on the stand and says the color of that book is white, I will never get him to change his mind about that, or make him say it is white. You members of the jury can see for your-

selves that it is red. Either one of two things has happened: The witness is either blind, or he refuses to tell the truth.

Mr. Hogan said in his opening that the witness-, when brought down to the District Attorney's office, and for quite some time, were neither frank nor complete. If Mr. Hogan said that, I believe it, and he did say that. I say further, the witnesses were neither entirely frank nor complete in [fol. 987] their testimony on the stand, because none of us was able to make them say that at any time were they not frank or incomplete when they told their story to the Grand Jury, or to members of the District Attorney's staff.

Now, in approaching the simple issue, we must examine to see what threats it is claimed were made, and of course what I say is always subject to correction. I intend to give you my best recollection; but if, at any time, your recollection disagrees with mine, please disregard mine. Use your own.

Now, the threats are definite in the indictment. The People must prove some of these threats. Maybe not all, but they can't introduce threats for the purpose of a conviction which are not contained in this indictment.

Now, what are the threats as alleged in the indictment? In other words, which ones must we consider, and which ones may we eliminate entirely right at the outset? I will read them to you.

"• • • by unlawfully and corruptly fomenting and declaring strikes among their employees (of the said corporations)".

Yes, there was some testimony about that. That is a threat we must consider.

"• • • By unlawfully and corruptly placing picket lines in front of and near the places of business of said contractors."

There was no testimony about that, but a strike and picket line are synonymous and I will say, yes, we must consider that threat.

"• • • by unlawfully and corruptly using their power [fol. 988] to prevent said contractors from entering into contracts with the International Union of Operating Engineers and the International Hod Carriers" et cetera.

I say there was no evidence whatsoever that such a threat was made. On the contrary, no unions wanted the

jurisdiction. I think that is admitted by everyone. How such language came to be placed in the indictment, I can't understand. But I think you will agree with me fairly that that threat does not exist in this case and you may eliminate it not.

"* * * by unlawfully and corruptly using their power to prevent said contractors from employing members of said labor unions"—that is similar to the last one, and is out.

"* * * by unlawfully and corruptly using their power to prevent said contractors from employing members of said labor unions at prevailing rates of wages." Let us consider that. We heard that. I say no such threat was ever made. There is no testimony in this case whatsoever to substantiate any possible such threat. And further, that the evidence, and particularly the documentary evidence, contradicts that issue.

Now, that is an important issue, because if people were extorting money, the fellow who paid it under such circumstances may have said, "Give me a break, give me low rates. Give me book rates." I was the one who introduced testimony on that subject. I introduced the only book issued by the Board of Water Supply, No. 306; that is the Associated Contractors' book, or the contract in which the Associated was the low bidder. That is in evidence, lady and gentlemen, and you may look at that. And you will find a list of book wages; and I introduced — sent by Local [fol. 989] 60, demanding higher wages. I introduced the actual contract, and you will find that the men received higher wages; not the maximum highest that they demanded, but 75% of their demands.

Now, you know in our bargains and in our negotiations we leave room for a little comeback. You will find that the book rate for common laborers— I am pressed for time, so I won't go into many items—called for 50 cents an hour. You will find that the letter requested or suggested 87 cents an hour. And you will find that the rate in the contract was 75 cents an hour. They got the laborers a 50 per cent increase over the book rate. Other than that, you haven't heard one word from any of the witnesses that labor was not receiving its proper reward for its work.

"By unlawfully and corruptly using their power to prevent said contractors from employing efficient, skilled, and competent workers."

I can skip that. There is no such testimony.

"* * * By unlawfully and corruptly using their power to prevent said contractors from receiving efficient, skilled, competent and productive effort from their workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business"—a general clause which has no effect.

So, in fairness to both sides, there is some attempt to prove that strikes were threatened, and if strikes were threatened under means whereby extortion was used, defendants are guilty.

Now, what harm would strikes result in to the contractors? [fol. 990] You will recall that both in his opening and throughout the case, the able prosecutor always asked the witness, "Did the contract contain a penalty clause?" "Yes." "And what was the penalty—$500 per day"—for every day that the work continued beyond the specified term. In the Walsh case, beyond five years. But is that the fact in the case? Search your recollections. I say no. I say that penalty clause, and the discussion of the penalty clause has no bearing in this case—just for the purpose of exciting your imagination, your anger.

Because, what is the testimony concerning the penalty clause, and who gave that testimony? One person, and one person only—Mr. Gillespie, the Chairman of the Board of Water Supply. Nobody questions Mr. Gillespie's integrity or honesty. Nobody says that he is biased one way or the other, and nobody says that that man would give false testimony? Do you recall his answer when he was questioned about the penalty clause? It is at page 537 of the record. This is the only bit of the testimony I will read from the record itself, because I want to be so very, very accurate in calling it to your attention. This is direct examination by Mr. Hogan.

"Q. Is there a penalty clause in the contract also, Mr. Gillespie?

"A. Yes. We have a penalty clause which we have the right to enforce. It calls for an entire recompense of any

damage we are put to, out of pocket, in order to do work which the contractor has defaulted in. And in addition to that, we exact a specific $500 a day damage.

"Q. And that liquidated damage of $500 a day would be [fol. 991] exacted if a company failed to complete its work in the schedule time, is that it?"

Now, the answer is important. "Is that it?" What do you think? Here is the answer:

"A. No. It would be predicated on that, but there would have to be, before we would do that, an element of neglect. Many a time a man might be delayed and he wouldn't have responsibility and we would have to take that into consideration."

But Mr. Hogan who wasn't satisfied with the answer, asked:

"Q. But is it $500 a day.

"A. $500 a day. But besides, complete compensation for any out of pocket money that we have been put to because of his neglectful delay."

"Because of his neglectful delay."—Not a penalty for a mere breaking of the schedule, not a penalty in the schedule was upset because of conditions beyond control of the contractor; only a penalty if he was neglectful.

Now, we know that contractors, when they have contracts as Walsh in the Midtown Tunnel job, could not be held to be neglectful if labor strikes.

So what fear is left to the contractors? Strikes? Well, take the Associated Contractors as an incident. Have we a group of clean, new, out-of-town contractors with small bank rolls, who are coming into New York territory, to underbid all our big local construction companies, and they are fearful of conditions? Or have we got the giants of industry, the biggest names in the contracting field? Who constituted Associated? Walsh Construction Company of Davenport, [fol. 992] Iowa, J. F. Shea, Incorporated, Los Angeles; Henry J. Kaiser Company, Oakland; Utah Construction Company, Seattle; and MacDonald-Kahn Company of San Francisco. Those names speak for themselves. Those fellows outbid or underbid the other bidders, probably the local bidders.

And upon whose experience were they relying? Mr. Walsh, who had 50 per cent of this job, as I recall the testimony. And what was Mr. Walsh's experience with labor, in what I believe he said was his first job East—the Queens Midtown Tunnel? His experience was primarily a difficulty with one organization—147, the sandhogs. Well, these big contractors who had built Coulee Dam, worked in San Francisco, and I don't recall that tremendous array of big jobs that Walsh testified that he did. Were they beginners? Were they afraid of strikes? Or did they want an edge around here, did they want to avoid the difficulty that Walsh had experienced with 147?

Now, I say that Walsh was not truthful when he denied that any great difficulty existed with 147. That is where he was not complete or frank, because Mr. McGeehan did succeed in having him say that he did not want to deal with 147, but he would never give a reason why. Was he completely frank? If we don't want to deal with anyone, we must have a good reason.

Mr. MacDonald said the same thing, but he minimized the difficulty he had experienced with 147. If the difficulty with 147 was only the ordinary, the usual difficulty that we experience in all labor relations, why was it that they didn't want to do business with them? Because they had a purpose [fol. 993] here, a purpose to clear their own skirts, and I think I can demonstrate that to you further.

I called Kenny. I don't know whether Kenny was a favorable witness or not. He certainly is still friendly with the Walsh Construction Company. He works for them, he got his job through personal contact with Tom Walsh. MacDonald calls him "Jimmy," and he calls MacDonald "John," and he has always done so. He described some of the conditions that existed and primarily that 147 had no respect for its contractual obligations; and secondly, that they were always in trouble with the other crafts. They were sort of outlaw craft; they wouldn't recognize the jurisdiction of anyone. That is why they wanted the International in the Picture, because if the International ruled and established jurisdiction, then if 147 caused trouble, all the other crafts would unite against 147, because they had been outlawed.

I can't review in detail Mr. Kenny's testimony. It is fresh in your minds. You do it for me. But I say one more significant fact stands out, which to me indicates that these

contractors were the ones who thought they may be doing wrong, and not the labor organizers or leaders. I assume that among these six giants, and the fact that there was a $21,000,000 contract involved, that they had enough capital to consult lawyers, and I assume that their lawyers would be regular, big, corporate, Wall Street lawyers—not that they are bad clients. I wouldn't turn them down. But it is safe to assume that they were in constant communication and touch with their lawyers. We know they were in constant communication and touch with their lawyers when they came to the District Attorney's office.

[fol. 994] Doesn't it seem strange, beyond any stretch of imagination, that not one of thes- six big corporations with their multiple directors or officers or stockholders, consulted a lawyer when it is claimed demands—extortionate demands were made upon them? How does that strike you? Do you think that somewhere along the line, if an attempt were made to shake these fellows down—and I will use foul language—that they would not have somewhere along the line wanted to consult an attorney. Do you believe that Mr. Walsh and Mr. Shea alone assumed responsibility to pay out of $150,000 of their associates' money, without in some form or manner advising their associates what they were doing, and for what purpose the money was going to be used?

Of course, they didn't consult lawyers, any of them. Why? Because they were doing something; these big giants of industry don't give up easily. Nobody threatens them, and nobody pushes them around—not with the wealth and power and legal talent at their disposal. They wanted something, and that is what they didn't dare tell their lawyers, because their lawyers may have said, "Wait a minute, boys. You might be stepping into something." They didn't care, they wanted friendly labor relations. They wanted to pay for it, and they wanted 147 out.

May I have five minutes more?

The Court: Yes. Go right ahead.

Mr. Polakoff (Continuing): Lady and gentlemen, we have agreed—I want to thank the Court for his generosity. Defense counsel had agreed to take the morning, so that Mr. Hogan could have the afternoon, but I don't intend to encroach upon Mr. Hogan's time.

[fol. 995] The Court: You will have plenty of time. Go right ahead.

Mr. Polakoff (Continuing): What is it they wanted? They wanted 147 out. Now, the contract with 147—was that signed by an International, by the Hodcarriers International? No. The contract of 60, signed sometime in December by 60, and the corporation, approved by the International, I believe the date was December—that contract was admitted into evidence. Why did they want 147 out? Now, let us look at a small incident, which will show a predisposition on the part of the contractors to buy, not pay, but to buy things they want, with their power and wealth.

You remember what Mr. Kenny said as to a conversation had with Mr. MacDonald, when Mr. Feeney, the head organizer, the leading officer of 147, caused the strike both on the Midtown Tunnel and at the Aqueduct? When they met in a car he said, "Jimmy, you think Feeney wants some money? Well, if he does, it could be arranged." Now, do you think Mr. MacDonald would dare take such a responsibility on himself? He wasn't a member of the syndicate. He was a highly paid employe. That's the tip-off in this case, and that is the only issue.

Now, I gave you that one little incident for what I thought might enable you to help reach a conclusion. If I covered the facts fully, I would require a long time, and that would be contrary to our understanding. To cover it in fragments wouldn't have the desired effect or serve the purpose of the summation. According to the rules of criminal procedure, the District Attorney sums up last; he has the last word. That is provided by law. No fault of his. But it does [fol. 996] constitute a great advantage. To answer him we would have to anticipate every possible argument. That isn't advisable. But the law also creates a forum where all arguments are considered, answered, debated and discussed, and that is your deliberations in this case.

Might I suggest very humbly, and request it in the same manner, that you argue this case, when you get anything that I have said that you disagree with, knock it down. But, by the same token, answer for us the arguments that the District Attorney may advance. And if they are not founded on fact, good logic, or have a good answer, you do it for us. Do it for both sides. I am sure that when you weigh this case carefully, you will disregard all the extraneous facts and considerations. Whether or not you approve of labor leaders, excepting Fay, is not at issue here. You may disapprove of them. I will not quarrel with you.

But on the other hand, as fair and impartial jurors, it is your duty—you have promised to do so, to lay that issue aside, and any other prejudice or favor that you may naturally have from your own experiences for or against labor, for or against the defendants, for or against the prosecution, for or against the contractors—I only want you to be fair, and I feel very deeply that if you consider this case only from the issue as presented by the indictment and the testimony from the witnesses, together with the surrounding circumstances, motives, prejudices, personal interests, I then feel that you must acquit the defendants of the charges in the indictment.

Thank you.

The Court: We are about to take a recess until 2:30. [fol. 997] The jurors will please refrain from discussing the case, or listening to any discussions, or forming or expressing any opinion, until finally submitted.

Recess until 2:30.

AFTERNOON SESSION

(All the jurors, the two alternates, and both defendants present.)

SUMMATION ON BEHALF OF PEOPLE

(Mr. Hogan summed up the evidence to the jury in behalf of the People, as follows:)

Mr. Hogan: May it please the Court, counsel, Mr. Foreman, members of the jury: I was alert at the time Mr. McGeehan opened this case in behalf of the defendant Fay, to gather, if I could, a glimmering of the defense that was to be suggested in this case. I listened carefully to the questions asked on cross-examination of every witness, to see whether or not that would give me an inkling of the theory they intended to advance; and I listened earnestly to the summations this morning, to ascertain what the attorneys for the defendants would claim was the defense in this case. Now, no matter how it is dressed up or how deftly or carefully it is expressed, it narrows down to this claim: that every single contracting witness called in this case took that stand and committed deliberate perjury. That is, if you take the decoration, the embellished language, if you analyze

the suggestions conveyed in the questions—not in the testimony, mind you, but in the questions of defense counsel—that is the proposition that you jurors are expected to be-
[fol. 998] lieve. They want you also to believe that although there is not a shred of evidence in the case to substantiate it—even with respect to payment, which I thought they had gotten around to admit—they seek to create suspicion, because, for the first time, we hear in the summation a reference to the failure on the part of witnesses to produce books. No witness was asked to produce them. You recall, Mr. Brewster said they were in his office, you were privileged to look at them. There was no request made of the District Attorney, no request made of the Court, that any witness should produce books.

Now, what did they seek to suggest? If the books were here, that Fay did not get the money? That Bove did not get the money? And Mr. McGeehan says money is not an issue in this case. Well, it is an issue, and the uncontradicted testimony shows that $368,000 of it went from the witnesses in this case to the defendant Fay and the defendant Bove.

They would gloss over that, and they can't half admit it. Well, you will hear testimony that money was paid, "and they aren't frank enough in the opening to say, "Yes, we got it."

You have heard no real discussion of the facts in this case. They couldn't afford to discuss the facts. They spent their time ascribing improper motives to the witnesses in the case and arguing, not from testimony but from theories—theories, mind you, created to dissipate the evidence and to explain it.

Now, I stated in my opening, members of the jury, that the defendants demanded money from these contractors, that the contractors paid the money to the defendants, that
[fol. 999] they paid it because they were afraid, and that they were afraid that if they did not pay it their business would be injured by labor trouble. The only way to intelligently sum up this case is to discuss the evidence, because it is only the evidence on which you may base a verdict. It is the answers of the witnesses, not the questions by counsel, as there were a great many theories and a great many suggestions contained in those questions. But it is only when a question is adopted by the witness that you may consider it; otherwise, the only thing you may consider is the answers.

given by the various witnesses in this case. So that I shall have occasion to read at great length from this black book, which is the text to which the jurors and everybody else must go, who will look for the truth in this case.

Now, you will recall that there was testimony in connection with a contract obtained by the Associated Contractors Corporation, of which Mr. Thomas Walsh was the president. That was a group of companies, and they submitted a bid on contract No. 306, which was issued by the Board of Water Supply of New York City, and that contract called for the building of a seven-mile tunnel in connection with this Delaware Aqueduct project up in Westchester—that particular tunnel.

And the testimony was—and it is important—that they did not use the book rates, the prevailing rates which are fixed by the Comptroller of the City of New York, and given to the Board of Water Supply. They received letters—I think one letter was submitted in evidence here—from the various unions, and they estimated their bid on the basis of [fol. 1000] higher rates. As a matter of fact, Mr. MacDonald testified that the rates he used were rates being used by the Shea-Kaiser group. You will recall that Mr. Shea had his own job up there, and in addition he was vice-president of the Associated Contractors Company. So it was perfectly natural that when Associated was awarded the contract, they would turn to Mr. Shea, who was already working up there, and say to him, "Mr. Shea, what rates are you paying the drillers and blasters and the operating engineers?" He said, "Well, I am paying them something between the book rates and the rates that are asked, and here are the rates." Then Mr. MacDonald said—and this all occurred before the meeting at the New York Athletic Club, that he called up Fay and Bove and said to them, "Associated has a contract. Will it be all right if we pay the rates being paid by Shea-Kaiser?". And they said, "Those rates would apply, you can bank on that."

And you will recall that in connection with the submission of the bid Associated was required to deposit a check for $500,000 to guarantee the execution of the contract; that after they were declared the low bidder, they were examined at length by Mr. Gillespie, as other contractors were, to determine their integrity and to determine their ability to carry out the contract. They were declared the low bidder towards the end of July 1938. It was a contract in excess of

$21,000,000, and the contract was awarded to them on August 4, 1938. At that time the check was returned, and a surety bond of $1,500,000 was posted to guarantee the performance of the contract.

Now, a week after the award—and I think it is significant that meetings with the defendants always occurred after [fol. 1001] the award—it wasn't while they were preparing the estimates, before they brought on engineers and auditors to compute the cost, but after they had submitted the bid and after the contract was awarded and after the bond was posted and they had put up their collateral with the surety companies. It was then and then only, in all of the cases that we have had here, that we have had testimony about, that the defendants sought out the contractors, when they were well advanced in the preliminary stages of carrying out the contract, and made their demands.

So, the testimony here is that a week after the award Walsh and MacDonald saw Fay and Bove at the New York Athletic Club, at an apartment shared by MacDonald and others. Walsh had never met the defendants before this time. There was some congratulatory talk, and then Fay asked Walsh if Charlie Shea had spoken to him. "Yes," said Mr. Walsh, "he has."

"Has he mentioned the reason why Fay and Bove want to see you and are here?"

"Yes," Walsh said, "Shea told us that you were coming to talk about money."

Well, there were a lot of questions, or a number of questions asked, particularly of MacDonald, as to who originated or who started the original impulse with respect to this meeting. MacDonald said frankly that he had called Fay a number of times, and he could not recall whether he telephoned Fay or Fay telephoned him. But there were questions asked on cross-examination, which permitted me to bring out on re-direct examination that Fay had asked Charlie Shea to arrange this meeting and Fay had asked [fol. 1002] Charlie Shea to tell the Associated officials that he wanted to see them. And that conversation his Honor permitted to go into the record, defense counsel having opened the door with respect to this conversation.

Now, Shea said to Walsh and MacDonald and Small at the Biltmore Hotel that he had been approached by labor leaders and asked for a certain sum of money; that he told these labor leaders he had never done anything of that

kind, and he was very loathe to do it, but they had finally persuaded him that it would be to his best interest to do it, and that the labor leaders then asked him—knowing that he was vice-president of Associated—if Associated got a contract, to tell Walsh and MacDonald that Fay and Bove wanted to see them.

Now, that is important, that we get this information that Fay and Bove had asked Shea for a certain sum of money and that Shea had decided to go along. Shea is dead, but it is important to remember that he was working on the Aqueduct job months before Associated started. He wasn't on the east tunnel job, there was no difficulty with Local 147 so far as this record is concerned; no reason is suggested why Shea of Shea-Kaiser should be asked for money.

It is suggested, however, that because 147 was in a position to be troublesome to Associated officials that that was the motivating cause for them reaching into the company banks and giving Fay and Bove $150,000.

Now, I want to refer to the conversation which was held at the New York Athletic Club a week after the contract was awarded to Associated. After some questions with [fol. 1003] respect to Shea, and testimony from Mr. Walsh that he told Fay that Shea had spoken to him:

"Q. Yes." Then, "What was said by Fay and Bove?

A. And then they started to explain to us about having been awarded a very large job, it would take a long while to do, and that they wanted to go along with us, they and their organization. We told them that that was fine, and we appreciated it, and we were, of course, willing to pay their scale of wages and their working conditions, and so forth.

"Q. What did you say about this money?

A. They then said that they thought they should be paid some money on account of this job.

"Q. What did you say to them?

A. I told them that we couldn't do that.

"Q. What was said after you told them that you couldn't pay them this money?

A. They went on to tell us this job is a very long one, a large one, very hazardous. Well, before that, I should say that we talked about how we were going to operate the job, for quite a little while, what headings we were going

to make use of, and about what number of men we would need, and so forth—into the details of that—and then, when the question of money was brought up, we told them we couldn't do that, we hadn't had anything of that kind in mind; we had worked on the Midtown tunnel, and no proposition like that had been made to us, and we did not know it until after we got the job, the job wouldn't stand it; we had no provision in our estimate for anything of that kind, and we just couldn't do it. They urged, on the other hand, that we could, it was a long job, and if their boys knew that we were going along for them it would [fol. 1004] make it much easier for us in the way of labor relations."

Now, did Walsh and MacDonald have to be told it was a long job? What was the significance of Fay's saying it is a long job, a large one, very hazardous, unless he meant to suggest that if they did not go along it would be more hazardous? Is that stretching the meaning of words? What else, in common sense, could the man have meant? Did he intend to convey that, by using those words? There isn't any other meaning that makes sense. Now, what does he mean when he says, "If the boys know Associated is going along, it would make it much easier in the way of labor relations?" Who were the boys? No question of bringing out any further information on that. One of the witnesses says he supposed the boys were the other leaders. How would the boys know whether Associated was going along or not? Only if Fay and Bove told the boys. What would they tell the boys? "Associated won't give us money; give them hell!" Or "Associated has taken care of us; here is your cut; lay off them!" Does it mean mean anything other than that? You can't escape that meaning. And to ask you to believe that it means anything else, is to insult your intelligence.

Continuing the conversation:

"Q. Was anything said about the control of men, of their men?

A. I think they mentioned—rather they mentioned, I am quite sure of the fact—that on account of the length of the job that their men sometimes got unruly and they were not able to be controlled, but if the boys—the leaders, I took [fol. 1005] it to mean—knew that we were going along for them, it would make it much easier to handle."

Now, what does Mr. Fay mean by saying that "their men sometimes got unruly?" Is he suggesting that occasionally they were ill-mannered, rude; that perhaps if Fay and Bove did not get money they would come in late occasionally? Not a bit of it. He was suggesting that if money was not paid you might well expect a piece of valuable equipment to be smashed up; you might well expect stoppages, you might well expect the men to do something that would give you labor trouble.

And again: "The men." Does he mean the members of the union? Who would tell the members of the union whether Associated officials were going along, whether they were nice to deal with or not? If Fay said to the men, whoever they are, "These fellows from the West are awful tough to get along with, you can't do any business with them; I think you fellows better give them the works," would that be sufficient? How would the men know whether to be unruly or not, unless they got the word from him, unless they were told by Fay and Bove that "you can't talk to these fellows?"

Continuing the testimony:

"Q. You started to tell us about the job being a risky one. Who said that?

A. Well, we knew it was risky, ourselves.

"Q. Yes, but did it figure in the conversation, is what I am trying to get at?

A. I think Fay mentioned that it would be a long job, it was hazardous, we were a thousand feet under ground, to the effect that if the organization knew we were going [fol. 1006] along with them it would make it much easier in case if any difficulty arose."

I don't want to repeat an argument already made. I think it is clear that the same attempt to convey a thought that something disagreeable might happen if Walsh and MacDonald did not go along, is contained in that statement also.

Now then, the next question is:

"Q. Now, did there come a time—how long would you say—how long would you say this conversation was going on, Mr. Walsh?

A. Oh, I would estimate about two hours.

"Let me ask you this question: During those two hours, what were you and MacDonald saying with respect to money?

A. Well, just like I have been telling you about here, that we objected to paying any money at all."

And then you recall that after two hours of arguing back and forth, Walsh asked, "How much do you want?" And Fay said "$225,000 or $250,000." I believe MacDonald's recollection is $250,000, Mr. Walsh says it was either $225,000 or $250,000. Walsh told Fay and Bove that it was out of the question, but Fay again said the job was a very large one, the largest that had been let by the Water Board up to that time, and that Associated could well afford to pay that money. Finally, MacDonald and Walsh talked it over, they realized what they faced, they pleaded with Fay and Bove to settle for less, they urged them to be satisfied with $100,000. Fay and Bove refused, that was too small, Associated could afford to pay more, and they urged Walsh and MacDonald to come higher, and they insisted that at least $150,000 be paid, saying—and the calculation, the very nice calculation enters into other [fol. 1007] payments that were fixed by these men—that it constituted or represented less than one per cent of the total amount bid on the contract. And there is evidence all through this case that at the outset of the $300,000,000 Delaware Water Aqueduct project, Fay and Bove got together and decided that one percent of this amount was their just due and they intended to get it.

He said he was letting them off easy at $150,000; $21,000,000 was the contract, strictly, one per cent would have been higher; and they agreed to pay the $150,000.

Now, Mr. McGeehan talked at great length about the failure of the witnesses in this case to say, "Yes, he threatened me specifically; he said that if I did not pay the money I would have a strike, I would have jurisdictional disputes, I would have this." There was no necessity for being that specific. These men were all-powerful in this labor situation. I think these witnesses have testified that as high as 90 per cent of the labor which was utilized on these jobs came from these two unions. They were International Vice-Presidents, they were in charge of the entire Eastern area, they did not need to do more than convey a suggestion, did not need to do more than make a demand;

that was sufficient to anybody listening to it to understand that there were alternatives unless the demand was met.

Think of the effect on Walsh and MacDonald, when they heard, after being told by Shea that they could expect that Fay and Bove would ask for money—think of the effect on them when they were asked for $250,000. Did these defendants mean business?

[fol. 1008] Now, extortion is the obtaining of money from a person or a corporation, with consent, but that consent must be induced or brought about by fear, as a result of words or acts which can reasonably be regarded as threats. Now, the form in which a threat is made, is not material. The Court will charge you with respect to the law, at the proper time. I am invading the Court's province to a slight extent at this point, to simply illustrate the facts in the case, with respect to which you members of the jury are the judges.

So I say, the form in which a threat is made, is not material. No precise words are needed to convey it. To determine whether a demand contains a threat, you must consider all of the language, together with all of the circumstances under which the language was used. You must consider also the relationship between the parties. That, I think, is the law; and I think his Honor, if he adverts to the subject, will so charge you.

Now, what kind of a fear are we referring to? It can be fear of injury to a person or property; and, as I said in the opening, there will be no testimony, there is no testimony in this case, referring to a fear of injury to a person. It is simply a fear that property might be injured. And when the law speaks of property, it stipulates that business is property and is so considered. Therefore, to give one to understand that his business will suffer loss, injury, or interference—whether it is done by subtle or insidious suggestion or specific statements—comes within the meaning of the extortion statute. It is wholly immaterial in what language that threat to do injury to property is [fol. 1009] expressed. The important question is whether the words intended to operate as a threat.

For example, suppose a gangster says simply, "Give me $5,000, and you will remain healthy," or a labor leader says, "Give me $5,000, and you won't have any labor trouble"; now if the corner grocer made either remark, it might not be reasonable to argue that the person to whom it was ad-

dressed was put in fear of any kind, but it is logical, it is common sense, to believe that a gangster might have designs on your health, and that a labor leader could and might, if you refused to go along, give you labor trouble. And that is all there is to the problem of extortion, as you examine it from a common sense standpoint.

Now, why did the contractors agree to pay? I have told you that the demand never came until after the contract was awarded, until after money had been spent preparing estimates, until after a surety bond had been posted. They knew who these defendants were, they knew their power. The defendants used very simple language to convey what they had in mind, and if there was any doubt in the minds of the contractors certainly the persistence of the defendants dissipated that doubt. At the New York Athletic Club on the first occasion, the testimony is that the conversation lasted for three or four hours; for that length of time the Associated Contracting Company was trying to get off the hook, but Fay and Bove refused to let them. The best they could do was to reduce the demand that was made.

Now, why did Walsh agree to pay, for the Associated [fol. 1010] Contractors Company? Well, let us read his own testimony, page 563. He was asked the question and he said:

"A. I will say I was fearful that if we did not do this there might be something that arose during the life of the job, that would very much, very materially interfere with the progress of the job, and would cost us a lot of money."

On page 564 the Court asked this question:

"Now, he (meaning Mr. Walsh)—he said he had a fear of some trouble. Now, he can elucidate on that. Go ahead. What were you afraid would happen?

"A. I had in mind the possibility of labor trouble, stoppages, slowdowns, possible strikes, in the event we did not go along."

Mr. McGeehan: That is not the full sentence, Mr. Hogan.

Mr. Hogan: I think you will find, Mr. McGeehan, that the Court struck out the rest of the sentence. Isn't that correct? That is why I didn't read it.

Mr. McGeehan: I think you are right, the latter part was stricken out, yes.

Mr. Hogan: Now, you will recall that there was also testimony from Mr. Walsh that he said to them, "But $150,000, I can't handle an account such as that; it will have to be put on the books as an expense." Fay objected, he would not have it that way, the money has to be paid in cash. That does not sound like a man who is putting a price on his services, does it? Services as a labor adjuster for some speculative work that he was to do in the future? Would such a person be afraid to have the organization paying for his services give him a check in payment and lift it on the [fol. 1011] books? Certainly not. But he objected, and when Mr. Walsh persisted, Fay said, "You will have to find some way of handling it, because that is the way we want it." But Mr. McGeehan complains that there isn't recorded on the books of any of these companies, "Pay to Joseph Fay for extortion, so much," He must blame his own client, who gave the original instructions and said, "That is the way we want it."

Now, you also heard Mr. MacDonald testify with respect to this same incident at the New York Athletic Club. He, you will recall, was vice-president of the Associated Contracting Company, chief engineer of the Walsh Construction Company. Now, what did he say, what is his recollection of what happened? He said that he went to the New York Athletic Club; he agrees that those present were Mr. Bove, Mr. Fay, Mr. Walsh, and himself. "We were asked," he said, "if Shea had spoken to us. Mr. Walsh told them that he did not want to pay any money, he objected. Walsh said that he had always gone along with the unions, he didn't see why he should have to pay any money on this job. They argued back and forth," MacDonald says, for over an hour. Walsh objected to the payment of any money whatsoever. Fay and Bove did not budge, he said. They claimed the job would go along very smooth if we went along with them on payment. And he testified further on page 670—this is all Mr. MacDonald:

"Q. Now can you recall anything else that was said during that first hour? A. Well, there was quite a bit of argument back and forth, why we should go along with this proposition.

"Q. Was anything said about labor troubles? A. Well, [fol. 1012] it was said that if we did go along we were sure not to have any labor trouble."

Well, what would anybody's common sense tell him, when an ultimatum such as that is delivered? Isn't it reasonable to suppose at this point that if you did not pay you were going to get labor trouble? That is what these two men concluded, and I don't think anybody can say that it was unreasonable of them to so conclude at that time, in view of the words that were used by these defendants. Walsh and MacDonald certainly understood what they had in mind. He testified also that they went into another room, they came out, and they asked how much? And Fay said they thought they should get $250,000. And MacDonald's testimony is that Walsh said that was ridiculous.

Now, MacDonald testified that he has known Fay since 1913, he has been on other jobs with him, and he turned to him at that point and said, "I think it is a very foolish thing to do, and I can't understand why you are doing it." But Fay said, "Never mind. The job will go smoothly, and it will be worth that much money to you to have everything go along nicely."

MacDonald recalls that the defendants were offered $100,000 and they refused it; that they argued back and forth, and finally the defendants agreed to accept $150,000; and that, as Mr. Walsh has told you, the defendants insisted that it should be cash and no book entries with respect to it.

Now, both Mr. Small and Mr. MacDonald testified that within a week after that meeting—and I think there was a check shown to the witnesses to refresh their recollection, and I believe the date of the check was August 19, 1938—[fol. 1013] Bove wanted $50,000. No conversation about Local 147. Bove didn't say "I want $50,000 now, because we have heard that in July of 1939 they proposed to call a strike." Not a bit of it. When MacDonald demurred and said, "Can't you wait a while? You know Walsh is out in Iowa and it is difficult to get ahold of him," Bove said, "We have got a convention coming up, we need the money and have got to have it." He turned over $50,000 to him in August of 1938.

Now, if the People had gone no further, members of the jury, a case of extortion would have been proven to the hilt. Demand was made; no solicitation or request of anything of that kind; there was a definite demand, backed up by a threat, veiled, subtle—however you want to characterize it—but it is there, it is implicit in the testimony of these men.

and there is nothing in the case to contradict these men—not a shred of testimony to contradict them.

The money was paid, there is no argument about that—the full $150,000, $50,000 in August of 1938, then payments right up to 1942, May of 1942. It just occurs to me that there was no testimony in the case that there was any large payment made around July of 1939, when this strike was going on, which has been lifted out of obscurity into this courtroom, to explain why Associated paid $150,000 to these defendants. The testimony with respect to payment, as I recall it, is that there were about 14 payments: The first $50,000 in August of 1938, the last of $30,000 to Fay at the New York Athletic Club in May of 1942, and the only other very large one $30,000 to Bove in the office of Walsh-Driscoll in August of 1941. That was the payment which [fol. 1014] MacDonald made in the presence of Walsh; it was one of the two payments that Walsh gave testimony with respect to.

Now, how do they seek to explain the payment of the Associated $150,000? And only Associated, mind you, because this theory, this fanciful business is introduced and can be applied only to Associated. Well, there is a union official named Kenny. He used to be an official of Local 147. And it was brought out in testimony that he was defeated for re-election in 1940. The International revoked the charter of 147 in January of 1942; they were having trouble with it, and they just revoked the charter. And they formed another local, Local 8, to take over the jurisdiction and the jobs formerly allocated to 147, the charter of which had been revoked.

Bove in the International made Kenny an officer. He was defeated for reelection in 147, so he jumps over to Local 8, the creature of the International, and Bove makes him an officer there.

Then he signs an affidavit that everything he did back in 1939 as an officer of 147, was illegal; and it was only when we questioned him on redirect that he said, "Well, it was illegal, and I protested," but on direct examination he was quite a hero, he was rushing up there with these bats, and he was leading the pickets, and he was explaining all of the details of this picketing and counter-picketing up at the shafts in Westchester County. But then, when on cross examination he was faced with the affidavit in which he said that the officers and men of 147 knew they did not have

jurisdiction at the time, they knew everything they were doing was illegal, then he volunteered the explanation, after [fol. 1015] lunch hour, that he protested, but, like a good union man he went along.

Now where is the truth? If he knew that 147 did not have jurisdiction, as he stated in his affidavit, can he ask you to believe that when he knew they did not have jurisdiction he was telling MacDonald that they did have jurisdiction? You just can't believe it. He is Bove's man, and he comes in here to testify to anything Bove wants him to.

Now, even he agrees with MacDonald that troubles with 147 were minor. You recall I asked him how long the stoppages were, and he agreed that if there were any stoppages it was a matter of an hour. It took him a long time to answer, and he agreed that they were minor disturbances. And he, mind you, is not the leader of the union; two persons named Feeney and Gallagher—they have not appeared here, they have not testified to any such evidence as Kenny gives, but they were the leaders of Local 147 at the time. Kenny was a New Jersey delegate. And the defense ask you to believe that a casual conversation, which he contends that he had with MacDonald in July of 1938—MacDonald says he recalls a conversation, but it definitely was in July of 1939, just before the trouble, just before the two weeks' strike—but he wants you to believe that as a result of this casual conversation in July of 1938, Associated officials told him that they were going to have trouble with Local 147, some time in the future, and were therefore seeking out Fay and Bove to pay them $150,000 to cushion that trouble.

There is no proof that Local 147 did anything in 1938—no proof, other than this casual conversation that Associ- [fol. 1016] ated had had any notification from 147 that they claimed jurisdiction. As a matter of fact, the only thing in the case is a letter, signed by Charles Locurto, president of Local No. 60, Bove's local, and countersigned, "James Bove, Vice-President," dated July 14, 1938, addressed to the Walsh Construction Company, but obviously intended for the Associated job. As counsel have admitted, because Walsh did not get its contract until April of 1939—submitting the rates of wages for all members of the International Hod Carriers Union Local No. 60 for all classifications of work to be performed on contract No. 306, which was the Associated contract.

"Wish to call to your attention that rates specified herein are exclusively for tunnel open-cut work." You can examine this letter, it is in evidence, and you are free to look at it at any time. But it certainly indicates that the officials of the Associated had every reason to believe that they would deal with Local 60. It was countersigned by a vice-president of the International. And, furthermore, there were four or give other companies operating in Westchester and other places on the Delaware Aqueduct Line, and they were using men from Local 60, and were not being bothered by Local 147. But that is just a smokescreen that is thrown in here to obscure from your eyes the testimony in this case with respect to this shake-down of $150,000.

And one other item that must be considered in this connection: It is also in the testimony that Local No. 147 was not suspended by the International until April of 1939. Both Mr. MacDonald and Mr. Kenny agree that the members of Local 147 were very busy on the tunnel job, that [fol. 1017] they were all employed, that there wasn't anybody available; and it was only after 147 was suspended that they decided that they had a fight on their hands with the International, and they were going to make it just as disagreeable as they could for the International, and therefore sent men up to picket on aqueduct jobs in July of 1939. But to suggest that it is any reason for Walsh and MacDonald paying $150,000 to Bove and Fay, is just ridiculous.

Now, don't confuse the payment of $150,000 by Associated with the payment by the Walsh Construction Company. The same officials, but an entirely different contract. And it throws light on the motives of the defendants in this case, with respect to the Associated. There is a tendency to lump the two together; but I beg of you to regard them separately. The Walsh Construction Company was awarded contract No. 316, which called for a 15-foot tunnel, 10 miles long, at Newburgh, about 500 feet deep.

Now, that was a contract of over $11,000,000. Walsh was declared the lower bidder in the middle of March, 1939, and the contract was awarded March 30, 1939. They posted a surety bond of $1,200,000.

And they stated—Walsh, at least—that they met Fay and Bove a week after the award—again after the award. And present on this occasion were Fay and Bove, Walsh, MacDonald, and Mr. Small. And Walsh said they very shortly got to the purpose of their visit, another job, another

shake-down. They expected Walsh to take care of them as Associated had. Mr. Walsh said, "We remonstrated, we told them that what we had already been paying was sufficient, and what we were paying was a heavy burden, and [fol. 1018] it should be enough for two jobs." Now so the defendants. This was another job. They said, "You can afford to pay on this one also."

Now, was it necessary to use specific words at this time? All they had to do was demand the money. Walsh and MacDonald—and I suppose Small, by this time—knew the alternative, knew if they did not pay what might happen.

Now, with respect to the conversation, Walsh said—and I read from page 573:

"Q. Now, will you tell us, when you agreed to pay the $75,000, were you in fear at that time, and, if so, of what?

A. We did it for the same reason we had agreed to pay on the Associated."

And they asked there for $125,000, and they objected and they argued back and forth for over an hour; told them it was not in the cards, and Walsh said he couldn't pay it, tried to dodge payment, escape the pressure; but Fay and Bove were equally firm on this occasion, they insisted the money must be paid; and the best that Walsh and MacDonald and Small could do was to get them down to $75,000, and Fay considered this very definitely a concession, because he told them, "Now, listen, if the job goes better you will have to pay $100,000."

And they wanted $15,000 in a hurry, for some reason or other, and there was a great rush about the first payment. This is in April of 1939—no strike or anything of that kind—but there probably was another convention at that time. But they needed $15,000 in a hurry, and they got $15,000.

Now, what does MacDonald say about the Walsh trans- [fol. 1019] action? He says they asked for money on the Walsh job. "We said we thought we had done enough. Fay and Bove said we should pay in order to keep everything running smoothly. Fay and Bove pointed out it was different territory."

Now, that is very interesting. This contract was on the Rondout-Lackawack Tunnel, west of the Hudson River. Their other contract was in Westchester, on the east side of the Hudson River. There was no testimony, even from

Kenny, that any trouble was anticipated on the west side of the river. There was no testimony from Madden that there were any pickets on the west side of the river or any trouble there, even in 1939, in July, although this conversation was in April.

There isn't anything, not even a suggestion, in the record, as to why the Walsh Construction Company would have any fear of trouble in connection with that job. There is no reason why, in April of 1939, they should suddenly decide to present $75,000 to Fay and Bove. They had no difficulty, even if we presume that they dug down and gave $150,000 in August of 1938, on the suggestion that there might be trouble from 147 a year later. They had no trouble from August of 1938, till April of 1939. Is it reasonable to suppose that they would then start on another payment of $75,000 and give $15,000 on that? In the desperate effort on the part of the defendants to suggest a reason for these payments, they neglected entirely to ascribe one for the Walsh payment.

Ask yourselves the question, why would the Walsh Con-
[fol. 1020] struction Company come up with another $75,000, unless they were clubbed into it, as has been described?

Now, MacDonald continues with his testimony. He said they argued for a long time that they had done enough, and then Fay said—and I read from page 681:

"Q. What were they saying during this hour or two, with respect to your unwillingness to pay? A. Well, that the job would go along smooth and we would go along like we had gone at Valhalla, and that we would be better off if we paid."

I submit that was sufficient at that time to warrant these two officials of Associated—three officials—there was Small—in deciding that they were up against it again and that they had to make the best terms possible to these defendants, who controlled the supply of labor they needed to carry out their contracts with the Board of Water Supply.

They asked for $125,000—the one per cent theory again—$11,000,00 contract, just a little over one per cent. The Walsh people objected and pleaded with them, but Fay and Bove knew their power and they knew they had the winning

argument, and they expressed it. And I read from page 683:

"Q. You have already testified as to the past. Now, how about this conversation?"

This is from MacDonald's testimony.

"A. Well, they said if we paid this, the job would run smoothly and we would not have any labor trouble."

They finally agreed to accept $75,000, Fay saying that it [fol. 1021] would be a hundred thousand if the job went well; that payments were to be made in cash, just as on the Associated job.

And bear in mind that nobody has testified that the payment was ever voluntary. You will recall that Killmer testified that he would get telephone calls from Fay, in which Fay would say, "It is time for our annual meeting." Perini testified that Fay or Bove would telephone him and say, "We want to see you. The next time you are in New York, we want to see you." Perini never agreed to pay; he said he found himself paying.

Mr. McGeehan—I don't know what point he was making when he said that—I don't know whether he intended to suggest that he never paid. There hasn't been any contradiction of the fact that he paid, and expressed by that language his reluctance to agree to pay anything, his refusal to pay anything until the pressure was such that he could no longer refuse them, and he strung it out as long as possible.

And on the Walsh job $62,000 of the $75,000 was paid. $150,000 from Associated, $62,000 from Walsh. And the payments were made over a period from August 15th or August 19, 1938, to May of 1942.

Now, Mr. Small also contributes some testimony with respect to the Walsh contract. He is the vice-president of Associated and vice-president of Walsh, but he is retired at the present time. And I just read briefly from his testimony, his recollection of what occurred at the New York Athletic Club. He says,—and this is page 739:

"After a little set talk, Mr. Fay said that he wanted to [fol. 1022] see us because he wanted us to go along with him on that job in the same way that we had agreed to go along

on the job for the Associated Contractors, that is, to pay him a certain sum of money."

"Q. And what did you say to that?

A. Well, Mr. Walsh, as I recollect, was the first speaker; he said it was ridiculous to think about it, that we had gone further than we should go on the other contract, it was an imposition to think that they would ask us to do anything further at this time on this job, that we did not know in the first place whether we would ever make a dollar on it, and irrespective of that, it wasn't right. And Mr. Fay says, "Well, I think it would be to your advantage to go along with us; that if you do, the job will run along better, there will be no trouble on the job.

"Q. Did he say what kind of trouble?

A. Well, during the conversation which lasted, I would say, two to three hours, probably, there was sometimes talk of labor trouble, and sometimes just trouble."

He recalls that they asked for $125,000 and that Walsh said it was entirely out of the question, and that it took two or three hours for this conversation; that Walsh felt it was impossible to get out of paying; they went into a conference; and on page 742 he answered to this question:

"Q. What was said then?

A. We advised them that we, as much as we disliked to do anything further, yet felt that we were in a place where we couldn't help ourselves, and that if they would reduce the amount to something more reasonable, that we would meet their demands."

[fol. 1023] Now, does that sound like contractors gladly and willingly paying, to adopt Mr. McGeehan's language, seeking out these defendants for positive, affirmative assistance in connection with some fight against the common enemy, so labeled in Mr. McGeehan's opening? I won't characterize it further.

Now we come to Mr. Perini, Louis Perini. I don't ask you to accept him on face; I ask you to scrutinize his testimony carefully, to recall what occurred in the court-room here, and to determine for yourselves what are the inherent probabilities with respect to his testimony, particularly as it falls into the pattern which we have seen exemplified in the Associated and the Walsh cases. He was interested in two contracts, the Seaboard contract, $10,800,000, a six-

mile tunnel in Westchester County; and a contract awarded to his own company, B. Perini & Sons, calling for the building of a diversion tunnel and a coffer dam at Lackawack, New York—a preliminary job, preliminary to construction of the main dam at Lackawack, which we know subsequently was let to Mason & Hanger.

He says he had about 400 employees on his own job, and valuable equipment there, about the same percentage he had to obtain from Bove's union and Fay's union. And in preparing his bid he used the rates of wages advised by the union, in estimating the job. He received a letter similar to this, and he did not strike a compromise between these rates and the book rate in the award of the Board of Water Supply; he accepted; so is his testimony, the rates suggested by the union. And that is important, in view of what transpired later on: they were higher than the book rates, and the rates asked by the union.

[fol. 1024] Now, you have got to think of him as an official of the two companies. Mr. McGeehan would want you to cut him in two. And he said there is no testimony with respect to Seaboard; but everything that Perini heard in this hotel he was hearing as the secretary of Seaboard and the president of Perini & Sons; and so indicated in his conversation, that anything that was said by way of a suggestion as to what might happen if he did not pay was addressed to him in his dual capacity. Now, it is true that there is no proof in the case that Seaboard made any payments. Mr. McLean is not here, and there is no proof of such payments. So that undoubtedly that count will not be submitted to you on the theory of extortion. But if language was used, which in common sense can be regarded as a threat, it can be considered an attempt, because any act done with the intent to commit a crime and tending but failing to effect its commission, is an attempt.

Well, Perini went over to a meeting at some hotel, he could not recall what hotel it was, and he went there at McLean's request and McLean was the president of this group of companies referred to as the Seaboard; and he met there Charles Shea, a man by the name of Fonn, who is described as an official of the S. A. Healy Company of Chicago; and Bove, the defendant Bove, inquired about McLean, and Perini said that he was ill at the St. George Hotel.

Now, what then did Bove say to him? Let us look at the record again, on page 800:

"Q. What happened after that?

A. Well, Mr. Bove told me they wanted $125,000." (This is with respect to Seaboard.) "They wanted $125,000, and they had talked to other contractors along the line, and [fol. 1025] they all agreed to pay $125,000.

Consider that in the light of what Shea told Walsh and MacDonald about the same time, and this is in May of 1938, three or four months before the Associated contract. "They all agreed to pay $125,000."

"Q. You said, on the line.

A. I mean, on this Delaware—on this Delaware Aqueduct project.

"Q. And what did you say to that?

A. Well, I told him that we had not agreed (meaning Seaboard) and we were part of the contractors on that line.

"Q. Meaning Seaboard?

A. That is right.

Q. You were an official of Seaboard?

A. That is right."

Then you will recall that Bove said, in addition to the $125,000 they wanted $50,000 on Perini's contract. Now, I can't improve on the record in connection with that. Page 801:

"Q. Now, was there further conversation?

A. Yes. He then asked me that on our contract he wanted $50,000.

"The Court: Who said this? Bove?

"The Witness: Mr. Bove, yes. And they were requesting $50,000 on our contract, that is, contract No. 339.

"Q. Yes. What did you say?

A. Well, I said, 'For what?' And he said, 'Well, we are going to give you some very good men up there.'"

Well, what would he get if he did not pay the $50,000—poor men? What sort of labor would they send him if he did not pay the $50,000? What is the suggestion contained [fol. 1026] there: "We are going to send some good men up?"

"He further says, 'We are going to see that you are not going to have any labor difficulties or strikes or labor dis-

putes, and we are going to see this job goes along very smoothly.'"

On page 802, the question was:

"Q. Now, at this point in the conversation, was anything said about wages?

A. Yes, I believe again at that time he said, 'Well, we could discuss wages and the rates of wages.'"

A little added adducement thrown in, despite all the fine talk in the opening about nothing done in this case involved any disloyalty to the union members. Oh, no. Mr. Bove threw that in. But Perini—and I called that to your attention earlier—had bid, based on the highest demands asked by the union. So he said:

Q. What did you say?

A. I told him we weren't interested in the rates of wages particularly, we had bid the rates of wages that were submitted, and we were satified to go along on them."

He at first refused to pay anything, he argued it was too much—I think the word he used was "disproportionate." And he said, on page 803:

"Q. What did you say to Mr. Bove?

A. I told him if we had to pay $50,000 on this contract, and also on the Seaboard contract, we would be getting a double trimming for our proportionate interest in Seaboard and also in this, in our interest that we had in this contract."

[fol. 1027] And there was a further argument, the amount was left open. Fay was appealed to, and he agreed it was disaproportionate, as indeed it was. $2,900,000 contract, I think it was—$2,800,000 and they wanted $50,000 on that, they were really asking for about five per cent on this one, and one per cent would be $28,000—at least two per cent, anyway. And the $125,000 on the $11,000,000 contract, just wasn't the proper ratio. And Fay said, "That is right, $50,000; we wouldn't demand that much, we will take"—and Perini's recollection is he said to Bove $25,000 or $30,000 would be fair on this one.

Well, Perini told them that he had discussed their demands with McLean of the Seaboard, and that he would talk over the $50,000 demand with his brothers—the $25,000 demand, I should say. And he has also testified that he brought McLean to see Fay with respect to this. And

as to his own contract, he says he never agreed to pay, but he just found himself paying; that they wanted a sizable first contribution. This was very early in 1938; no suggestion that Local 147 was involved in this at all, not even by a question—no testimony in the case, not even a question to suggest that 147 had anything to do with Perini. And he recalls that he paid $5,000 in Bove's office and that ultimately he paid $25,000 to Bove. And Fay occasionally would ask, "Did you see Bove?" And if he hadn't Fay would tell him to see him. Then occasionally Fay would tell him to have McLean get in touch with him.

Now, Mr. McGeehan did not recall that, whether or not we had asked Perini to give his reason for paying it. It [fol. 1028] so happened that we did, and on page 850 he gave this answer:

"Q. When you paid the money on behalf of B. Perini & Sons to Bove on the Lackawack job, why did you pay it?

A. I paid it because of the fact the statement that he had made, that if we paid that sum of money the job would go along smoothly, we wouldn't have any labor disputes, strikes and walkouts, and everything would go along fine."

Now, Perini constituted a real problem for the defense: No dealings with Local 147, they couldn't utilize that; nothing from Kenny or Madden with respect to Perini; he was away up there in Lackawack, away up near the dam, far removed from even the trouble in 1939. No question about rates, no question about wages with Perini. He prepared his estimate, based on their highest bids, so they were really up against it; they couldn't suggest to you by questions mind you—not by testimony—that Perini was paying for a break in wages. They didn't even ask him the question, didn't even ask him what wages he was paying, what wages he was paying to members of Bove's union and Fay's union. If they had any such testimony, they would asked it of him. They did not ask him anything about 147, not a word about that either.

So they had to shift, they had to shift to their third defense, it had to be a bribe in Perini's case. But a bribe for what? Mr. McGeehan tried to suggest for what. He asked a few questions on page 814—he dropped them pretty fast, because Perini did not say much about Fay;

and he only asked a few questions, but he left enough to [fol. 1029] suggest to your minds why Perini was paying it.

"Q. And when you bid upon the Aqueduct job for Perini & Company, you had some concern as to whether or not, because your company was non-union up in New England, whether you would be able to get contracts with the unions on this job, had you not?

A. No, I don't think that is correct, Mr. McGeehan. I believe at that time we weren't particularly concerned about that."

That was the substance of his cross examination. There was a little talk about Ben Smith, and why did Ben get out of the Seaboard, and isn't it true that Ben took the thing away from McLean, and isn't McLean the fellow who throws dollar bills out of a hotel up in Canada? But that is the only question that suggested a motive other than a shake-down, on the Perini payment.

Mr. Polakoff pursued the same course. On page 830 he asked this question:

"Q. Now, didn't Bove, as a condition of his union entering into a contract with B. Perini & Sons for work to be done on the contract, request and force B. Perini & Sons to unionize in its New England territory?

A. If I understand that question, my answer is no."

Mr. Polakoff went further. He was certain he could prove the point by reference to the Lincoln Tunnel job, and he asked this question, on page 825:

"Q. And you were advised by Mr. Bove before the Port Authority hearing that you would have to use union labor [fol. 1030] in New York on your job on the tunnel; is that right?

A. Are you placing this at this Port Authority hearing?

"Q. Yes.

A. I don't think I was given the opportunity. I was not told that we would have to. I think he objected to us being awarded the contract.

"Q. Unless you used union labor in New York City; is that right?

A. That is not right."

Now, Mr. Polakoff thought he had the answer. He thought that it could be suggested to you that the $25,000

was paid to Bove and Fay for their promise to let him work on this, if he promised that he would unionize his help up in New England. Mr. Polakoff is a very able lawyer. And on cross examination he is not opening any doors that gives the prosecution or the other side an opportunity to bring in any information that will hurt his client.

I must assume that the defendants did not tell Mr. Polakoff, did not tell Mr. McGeehan, about the $50,000 shake-down on the Lincoln Tunnel job, because he never would have asked that question, he never would have permitted me to get that evidence before this jury. We were concerned with the Delaware Aqueduct job. That $50,000 payment throws light on all the transactions.

Now, what happened?

A. Mr. Perini was declared the low bidder on a Lincoln Tunnel job in November 1937, a $700,000 contract, a small contract, and that contract was with the Port of New York Authority. He had a conversation with a Port of New York Authority official. As a result of that conversation he rushed over to Newark to see Fay. And he found Fay sick in bed, and Fay said, "I am very sorry. Nothing can be done for you. The unions have decided that they are [fol. 1031] not going along with you on this contract."

He went to a Port Authority hearing a few days after that, and he heard himself denounced by Bove. Bove said, "I don't care what happens, whether you award this contract to Perini or not, we are not going along, the unions are not going along. We will strike the whole job." And he accused Perini of arresting two union leaders up in Westchester for trespassing. Perini denied it, but he went out of there, figuring that he could never do anything on this job, because of the determination of Bove and of Fay to resist their getting the contract, and, if the Port Authority persisted and gave them the contract, to raise just as much trouble as they could.

Well, a few days later he was amazed—amazed to receive a call from Bove; and Bove said, "Will you come up to my office?" He went up to his office on 42nd Street, and there, to his amazement, he found Bove preparing a labor contract. He thought he had misjudged this man. Why, here he was, after all this denunciation at the Port of New York Authority—he was preparing this labor agreement.

He even told him, "Mr. Perini, this is a contract we will draw here, but it hasn't anything to do with your work in New England. You can continue to be non-union up there. Now we have got to go down to Fay's office tomorrow." And an appointment was made for Fay's office the following day. I am sure that Perini slept very well that night, he thought that he was going to be able to go ahead with this contract which had been awarded to him in the meantime.

And this was late in December of 1937, some five months [fol. 1032] before the Seaboard and Perini conversation. Well, he got to Fay's office, and he wasn't there more than a few minutes before he was told why Bove and Fay had suddenly such a change of heart, because he was asked and it was demanded that he give $50,000 on this $700,000 contract. $50,000 was the price that Fay and Bove put on this $700,000 contract. "If you want to do business with us, you have got to pay us $50,000." Why? On page 844:

"Q. Now, give us the conversation.

A. Well, at the time I went down there I saw Mr. Fay and Mr. Bove, and they told me they did not want to see—at that time, previous, for us to have the contract; and since we had gotten this contract, they wanted $50,000."

"Q. What did you say to that?

A. And I asked them, for what?

"Q. What did they say?

A. I asked them, for what? And they said, 'Well, if you pay us the $40,000, we are going to give you good laborers, good men, and you are not going to have any jurisdictional disputes, strikes and walkouts, and we will have to help you get permits.'"

Now is there any doubt as to where the truth lies with respect to the Perini transaction? He wasn't even cross examined about the $50,000. There wasn't a single question asked about it. There wasn't even any suggestion as to why this man had to pay $50,000 to these shake-down artists. It wasn't even referred to in cross examination.

Does that incident throw light on the Seaboard and Perini transactions? Do you believe what Perini is saying with respect to the $125,000 demanded of Seaboard, the $50,000 [fol. 1033] demand on Perini Brothers, the $25,000 payment by Perini brothers? Why, Perini isn't fully unionized to this day, and these great union leaders, who do nothing involving disloyalty to their unions, dealt with him. Of

course they dealt with him! They didn't care whether he was unionized or not so long as they got money from him.

The Court: Would you like a recess, Mr. Hogan?

Mr. Hogan: Thank you.

The Court: Take a short recess, and the jury will please not discuss the case.

(Whereupon a short recess was taken, after which the trial was resumed—all the jurors, both alternates and both defendants being present.)

Mr. Hogan (Resuming): Now, members of the jury, with respect to the Mason & Hanger contract Number 340 for that coffer dam at Lackawack, a six-year job; that was a $15,000,000 contract which was awarded in August of 1939, and William Brewster had a subcontract on it for $5,000,000. Brewster testified that he has known Fay since 1924. Fay elected to deal through him with respect to Mason & Hanger.

There was a meeting at the Commodore after the contract was awarded—the same pattern as in the others. And Fay and Bove told Brewster, "We understand you have a subcontract on the Mason & Hanger job. If Mason & Hanger want to have a smooth running job without any labor trouble, we'll have to be paid $60,000. Will you give that message to Killmer who is expected here in a little while?" Brewster agreed to do it, and he did tell it to Killmer.

Killmer said it was a lot of money, he would have to take it up with the officials of his company. Brewster told him [fol. 1034] to take it up with Fay and Bove himself, that he didn't want to have anything more to do with it.

Now, how much of this does Killmer agree to on his testimony? Mr. McGeehan has adopted Mr. Killmer; he calls him the only honest and truthful witness in the case. Killmer said he went to the Hotel Commodore. He said he saw Brewster in a room there. Brewster said, "These fellows want $12,000 a year." Killmer replied, "That's a lot of money. I haven't any right to hand it out without authority from my superiors." Brewster agreed, Killmer says, and volunteered to see what he could do. That's the first discrepancy. He went into the next room—Now, I beg your pardon. There was also a discrepancy in this sense: That I think Brewster said that the conversations occurred in one room. Killmer said it was a suite, and he remained

in one room while Brewster did his talking with Fay and Bove in another room.

Killmer's recollection is that Brewster went back, presumably to argue with Fay and Bove, and tell them that Killmer didn't want to pay that much; he thought twelve thousand was too high. Killmer says he then returned to Brewster, and Brewster said—and I read from page 924: "Their price is $12,000. You know, Miles, there's a lot of satisfaction in being ready to run your job right, without any interference, and to keep the job clean and have no relation—no labor troubles and no strikes, nor jurisdictional disputes."

Now this is Killmer talking—the honest and truthful witness. That is what he recalls that Brewster told him at the time, which doesn't vary greatly from what Brewster [fol. 1035] says occurred. Killmer said, "All right; if the firm agrees". Then Killmer recalls that Fay and Bove came out and Fay said, "Thank you, Mr. Killmer, for making a contribution, but you know, I would do all I could for the job anyhow."

Both men agreed that there was no mention of rates, no mention of wages there. Killmer testifies that he did have in mind that he wanted the book rates, and that it would be worth $5,000 a year to him if he could get the book rates rather than pay any more. Brewster says he recalls a discussion about rates, but he doesn't recall engaging to arrange for $5,000 to be paid with respect to wages. If Killmer had it in mind, he certainly never had an opportunity to express it. He went there. He didn't testify—but assume he went there on the $5,000 proposition, had it in mind; he doesn't say what he had in mind, but he went up there thinking he was going to talk about it. He never got around to talking about it, so far as his testimony is concerned. He was met with a demand of $60,000—$12,000 a year for the life of the job, if he wanted a job without labor troubles, without strikes and jurisdictional disputes. And I questioned him specifically about it, on page 943:

"Q. Mr. Killmer, when you went to the Commodore, were you asked to pay 12 thousand a year for book rates?

A. No.

"Q. Did you agree to pay 12 thousand a year in order to get book rates or any other rates?

A. No."

Killmer agrees that $36,000 was paid to Fay and Bove. The first $12,000 was paid by Brewster, reimbursed by Killmer; the second two payments aggregating $24,000 paid to Bove.

[fol. 1036] Why was the money paid? If Killmer got a break in rates for his money—and he is the truthful witness, so characterized by Mr. McGeehan—wouldn't you think they would ask him a question about that? Wouldn't you think one of the defense counsel would say, "Mr. Killmer, isn't it true you paid the $12,000 for a break in rates?" If that were true, wouldn't they have a labor agreement in here to show he did get a cut on rates? It wasn't even suggested by a single question at any time during the cross examination, and there is no testimony in the case that Killmer's firm got any break in wages—not even a suggestion in any question. Moreover, there is no testimony in the case to contradict Brewster or Killmer.

Now I said something about witnesses; in my opening statement I suggested to you that they were not anxious to testify; that they weren't complete when they came to the District Attorney's office, that they weren't frank. You heard Perini testify that he was hiding out, trying to evade us. You heard Mr. Brewster testify and Mr. Killmer testify that there was a discrepancy in their testimony. The discrepancy existed when they took the stand here. And Assistant District Attorney Thomas Moore was trying to get their recollections to agree on it. Their recollections don't agree to this day.

These witnesses are still in the contracting business. They are still doing business with the unions of Fay and Bove. They would like to get off the stand here and feel that there wasn't any hard feeling. They tell the facts in the case and hope that there won't be reprisals, but they wouldn't add a comma to the facts. If the truth has them [fol. 1037] worried, do you think they would add anything to the truth and try to remain in the construction business? I should say not!

Now isn't it clear what the defendants intended in the Mason & Hanger matter, when you consider their conduct with Brewster himself? On the subcontract, did they overlook him because he was from Jersey? Fay had known him since 1924. "$5,000 a year it will cost you, Mr. Brewster, on that subcontract."—Three years, $15,000—paid it to Fay.

And he got himself a job of his own up on the Neversink Reservoir 'way up there at Lackawack. That was in 1941, two years after this strike that has been dragged in here to try to explain the Associated count. And Fay met him in Florida and demanded money—"Got to have $30,000 on that job." Brewster said all right. About a month later, Fay met him again in New Jersey. In the meantime Fay had found out that the contract was for $3,400,000, and Brewster had told it was $3,000,000. Well, one per cent was still operating in 1941, and you recall what Fay said to him. I read from page 881 because I want to do full justice to his language:

"Q. Yes.

A. And he said that $30,000 wasn't enough, that he wanted $40,000 on that job, and if we wanted a smooth running job, no labor trouble, that the job was worth $40,000.

"Q. Did he give any reason for hiking up the price?

A. Only that he had talked it over with the boys, that's all.

"Q. Did he say anything with reference to the amount of the contract?

A. Yes. He said that the contract was three and a half million dollars instead of three million. I had told him in [fol. 1038] the other conversation that it was about three million."

Well, "the boys" were certainly enraged at this—only $30,000 on a three million dollar contract when it was actually $3,400,000. Now, why did Brewster pay? If he were attempting a bribe of some kind, wouldn't he have been asked some question with respect to that $30,000 payment and the other $15,000 payment? Not a single question in the record, and you have the right to examine it, why he paid $15,000 on the Lackawack contract. Not a question in the record for any reason that might be suggested why he paid $30,000 on the Neversink contract. They can't even think of a reason there. Obviously because there were two additional shakedowns, and those two additional I submit indicate the true character of the Mason & Hanger transaction.

Now the defense in this case, members of the Jury, started out to be "services". Mr. Walsh, from the Associated, was the first witness, and that was the thought that was uppermost in the minds of the defendants at that time. But it

applies and it has been given application in this case only to that one count. It isn't elastic enough to stretch to cover the other counts.

These defendants were the heads of labor unions, eastern managers, International vice presidents. What are they supposed to do for these unions? What are they collecting dues and initiation fees for? If there is a dispute with another union, wouldn't the members who are contributing the dues and paying the initiation fees expect them to go to the front and to take action. If they are leaders, that is when the workers expect them to prove it. When there is [fol. 1039] a strike such as they had in 1939, if it costs money, that is the whole theory behind dues and initiations. Madden says, a Local 472 delegate who has an office in the same building with Fay in Newark, that it was a proper union expenditure, proper union activity—picketing and counter-picketing.

No proof in the case as to how much was paid, even though it is suggested that this $368,000 went for that purpose. No proof Fay or Bove turned over $368,000, or $68,000, or $6,000. And if he did turn some money over, there is no proof he didn't get it from the union, which was the proper place to look for it, and undoubtedly where he did look for it, and where he did get it.

Now let us analyze the defense a little more. This kind of trouble, that July 1939 strike, is a common occurrence. It isn't confined to the Operating Engineers, or the Common Laborers Union. Nor is it limited to the Delaware Aqueduct job. According to the defense on this one count, mind you, the contractors gladly and willingly imposed a tax on themselves to meet what has always been a union expense. Mind you, they didn't promise to pay if trouble occurred, and trouble arose in 1939. The defense would have you believe they willingly and gladly paid out hundreds of thousands of dollars, out of sheer generosity.

If extortions can be painted in this light, a corrupt labor leader can demand as much as he think the tariff will bear, and be free from criminal prosecution provided he can point to some labor dispute on the day of reckoning and say, "When I asked for the money four or five years ago, that's what I had in mind."

[fol. 1040] Frankly and fairly, this is a makeshift defense. The defendants decided they couldn't very well deny receiving the money, although they were never frank enough to

come out and admit it. You recall the opening made by Mr. McGeehan. It certainly was less than definite as to what the defense was going to be. They weren't sure how at that time they were going to attempt to explain away these payments, Mr. McGeehan referred very generally to "services" and "a common enemy"; and for the first time in his summation he suggested—pure suggestion—he agrees there is no testimony—he hasn't any knowledge, but he suggests it for whatever it is worth; throws it out in the hope that somebody will take kindly to it—that the prosecution was inspired by the Sandhogs Union.

Not a word in the opening about wage scales. Not a word about bribes. That came later in the case when witnesses didn't accord to the service theory of the defense. The defendants improvised as they went along, and the constant shifting from one theory to another made perfectly evident, I submit, that the defense is entirely false.

On the Associated count alone they tried all their defenses. Mr. Walsh, the first witness, was questioned about services, Local 147, the jurisdictional dispute; and when he had given answers to it, "No". if he said he didn't know, that that was subject matter that did not come within his jurisdiction, defense counsel said, "Oh, Mr. MacDonald knows that; Mr. MacDonald knows that."

Well, Mr. MacDonald took the stand and he frankly denied that Associated had any concern about 147 in July of 1938. He said they knew that Local 60 had jurisdiction, [fol. 1041] they had received a letter in July from Bove, a month before the New York Athletic Club meeting; and he said that other firms, four or five of them, including the Shea-Kaiser firm, were already working under the jurisdiction of Local 60, and that he knew that he couldn't sign with 147 because Local 60 had the jurisdiction.

Well, when that didn't bring any comfort, the defendants shifted to the wage rate theory, and they tried to bring out that Associated was trying to reach a compromise on wage scales at that meeting, and they asked Mr. McDonald if it weren't true he didn't have the award on the table there, and if he didn't talk about wage scales, and tried to get in the theory that the $150,000 was to get a break on the wages, although there is no testimony to that effect, that they did get a break. But it was suggested again in questions, and I think if his Honor adverts to that, he will tell you that the

questions, and some of them were very long, are not evidence unless adopted by witnesses.

MacDonald, however, frankly denied the wage rate theory; that the rates he used in his estimate were the rates being used by three or four other companies already on the job, and furthermore he checked with Fay and Bove, and they said those rates were all right.

Now comes Mr. Small. You recall the questions on cross examination with respect to him. Nothing about 147; nothing about wage scales. Every question that was asked was designed to plant the suspicion that he was engaged in a bribe. You recall Mr. McGeehan read the bribery statute to him. He stood over there and he had the book and he was [fol. 1042] reading him all about the bribery statute, and he insinuated that the attorneys for Small and Walsh and MacDonald had conspired with all the witnesses to change their testimony. Now, how does this square with the opening in which Mr. McGeehan said that the acceptance of money by these defendants involved no disloyalty to their unions? You can't have a bribe unless a union official agrees to do an act disloyal to his union.

But they are unwilling even to go that far. It is just a suggestion—just a smokescreen to divert your minds from the testimony in this case. There is really no point in discussing the other counts with respect to the defense. Nobody has suggested—you can search the record—nobody has suggested by even so much as a question why there was a payment on the Walsh contract. It had nothing to do with 147. Wage rates weren't mentioned, unless the questioning of Small on the bribe theory is accepted on that point.

Perini—they dropped him without an explanation at all: when he hit them with that $50,000 shakedown they had enough of him. They didn't even suggest, not even in summation—they asked you to discredit everything he said. "Don't believe him, don't believe a word of it", but they didn't give you any reason why Perini would be paying $25,000 to Bove, and the year before pay $50,000 to Fay.

Brewster—they asked him nothing on the $15,000 paid at Lackawack. No theory suggested why he should pay $30,000 at Neversink. Killmer suggested that it was for wage rates, and they never asked him the question, never produced any testimony. Killmer, who is characterized as a truthful witness, gives the explanation which I have read and which is in the record.

[fol. 1043] There is no defense in this case. What has been said is simply propaganda. The hope is that if a thought is expressed often enough, somebody on the jury will say, "Where have I heard that before?" and make the mistake of thinking that a witness said it, and not that it was contained in some question to which the witness answered "No, nothing of the kind." That is the hope. There is no testimony in the case to support a defense. There isn't a shred of evidence to sustain any of the many and varied contentions of the defendants.

You should bear in mind also, members of the jury, that this is not a contest between the contractors and the defendants in this case. The crimes charged here are committed against the People of the State. They constitute serious violations of the Penal Law. Unfortunately, labor unions furnish a handy medium for corrupt labor leaders to commit this type of crime. These men develop a sense of proprietorship. They treat the unions as their personal property; they use them as clubs to beat out tribute from those who must deal with unions.

When Fay and Bove made demands for money, it wasn't something a contractor could ignore. Here were no shop stewards, no delegates speaking. Here were two of the most powerful leaders in the country, International vice presidents in charge of the entire eastern area. Their word was law. They controlled as high a 90 per cent. of the labor supply required by these contractors. It was within their power to destroy these contractors.

They demanded money. The demand itself spoke volumes. When they said, "We want money"; they didn't [fol. 1044] need to say much more to put the contractors at their mercy. They didn't have to say, "We can call a phoney strike that will cost you plenty", or, "you understand, don't you, Mr. Contractor, that we can give you plenty of trouble on this job if you don't pay us money?" They didn't have to go that far. They weren't talking to children, nor to persons unable to recognize labor racketeering as it is practiced by brazen thieves—thieves in every sense of the word—they rob their unions of their good name. They steal the power given them by the members of the union. They line their pockets with the money they obtain as the result of that power. I say to you that if the twelve truest friends that labor ever had were sitting in judgment

on the defendants in this case, the testimony would not permit them to do other than denounce by their verdict the actions of the defendants as charged in the indictment in this case.

And I ask you, Members of the jury, to let your verdict reflect condemnation of the misuse by these defendants of the power and authority entrusted to them by the members of their unions. The conditions that existed in this heavy construction field, as revealed by this evidence, are a disgrace to any community, and I feel confident that by your verdict in this case we shall do much to root out these conditions. We shall also serve notice that racketeering will not be tolerated in this city. The testimony in this case, I repeat, admits of no doubt. It is virtually uncontradicted.

Members of the jury, uphold the law, and I ask you, on behalf of the People of the State of New York, to return a verdict of guilty in this case. Thank you very much for your courtesy and your patience.

[fol. 1045] (There was a conference at the bench.)

The Court: The jury is about to be excused until tomorrow morning at ten o'clock. There are some motions to be made in connection with the case with which you are not concerned. Please remember the admonition not to discuss the case among yourselves or with anyone else or permit any discussion in your presence, or form or express any opinions until the case is finally submitted. You haven't heard the law yet. You have heard the arguments. Keep your minds open until the case is finally submitted to you tomorrow morning. The jury is excused. The Court will remain in session.

MOTION FOR WITHDRAWAL OF A JUROR AND A MISTRIAL

(The jury then left the court room, and in their absence the following took place:)

Mr. Polakoff: May it please your Honor, I assign as misconduct and therefore move for the withdrawal of a juror, on the grounds that the District Attorney made improper, inflammatory remarks in his summation, as follows: (1) Where he referred to the fact that Mr. Polakoff opened the door to certain testimony due to the fact that his clients forgot or failed to inform him that they had shaken down Perini on previous occasions.

Now I hope I get the thought over to your Honor. It is impossible to get the exact language, or even the full substance. It is difficult to take notes.

Also where he stated that the contractors on the stand were even now afraid of these union leaders, and that they were still doing business with the unions represented by these leaders. There is no such evidence in the record. And that these witnesses had hoped to leave the stand [fol. 1046] without any hard feeling between them and the defendants.

On several occasions he referred to the fact that there is no defense in the case, and concluded by saying that the testimony of the People is virtually uncontradicted. I maintain that that is an indirect reference to the fact that the defendants have failed to take the stand.

I assign that portion of his summation where the defendants were referred to by vile names and he used adjectives for the purpose of creating an inflammatory condition in the minds of the jurors; also where he referred to the fact that the jury would do much to root out a condition of racketeering in the City of New York by convicting these defendants. What takes place in the City of New York in other matters is of no concern to the jury. Whether racketeering does or does not exist, it is not a proper subject for the consideration of the jury.

On those grounds, and on the further grounds of portions which I do not recall, of his summation, that were highly inflammatory and prejudicial, I move for the withdrawal of a juror and a mistrial.

The Court: Does the other defendant join in the motion?

Mr. Fitzsimmons: He does.

DENIAL OF MOTION FOR WITHDRAWAL OF A JUROR AND A MISTRIAL

The Court: Denied. Exception to both counsel for any remarks in the District Attorney's summary. Anything further? Recess until tomorrow morning at ten o'clock.

The Clerk of the Court: Bail is continued on both defendants.

(Whereupon an adjournment was taken to 10 A. M., Wednesday, March 14, 1945.)

[fol. 1047] Room 1530 Criminal Courts Building, Wednesday, March 14, 1945.

(All the jurors, the two alternates, and both defendants were present.)

(The Court then charged the jury as follows:)

THE COURT'S CHARGE

MUNSON, J.:

Members of the jury: In 1937, contracts began to be awarded on the Delaware Water Supply System. In that year, the Walsh Construction Company was engaged on the construction of the Midtown Tunnel, and B. Perini & Sons were awarded a contract for work on the Jersey end of the Lincoln Tunnel.

The defendant Bove was International vice-president of the Hod-Carriers, Building and Common Laborers Union of America.

The defendant Fay was the vice-president of the International Union of Operating Engineers. Both of these defendants had long been identified—Fay for more than thirty years—with labor organizations; and for many years, as part of their duties, they negotiated labor contracts, and aided in adjusting controversies between union members and employers. They undoubtedly were, in 1938, two of the most powerful representatives of organized labor, at least in the United States, if not in the world.

The Delaware Water Supply System was being constructed by the City of New York, and huge contracts were awarded to many of the largest and best known of the com- [fol. 1048] panies then engaged in heavy construction work. We are concerned in this lawsuit with certain relations between these two defendants and members of a half dozen of these contractors engaged in the construction work on that project.

In the first place, let me say this is a court of justice, not an arena in which the District Attorney is battling against two labor leaders. You are a jury of the defendants' peers, selected with particular care for the sole purpose of seeing that justice is done without fear or favor. You are not crusaders, and you are not interested in rackets in New York City, nor in the opinions of others concerning labor unions in general, or these defendants in particular. Under

your oaths, you are required to render such a verdict as the evidence produced in court upon this trial, and the reasonable inferences to be drawn therefrom, warrant.

This case is important, not only to these two defendants, but it is just as important to the People of the State of New York. You are not to blame for what actually has happened between the defendants and these contractors, but you are responsible for determining what the facts really are. You are not concerned with any misconduct or alleged misconduct on the part of either of these defendants, which may have come to your notice during the course of this trial, which has not been charged in the indictment nor proven in this case. You are to concern yourselves solely with the particular charges made by the Grand Jury, and contained within the indictment, upon which I shall have more to say later.

In addition to the proof in regard to those acts set forth in the charge, you have heard testimony as to payments [fol. 1049] of money made by Perini & Sons to the defendants in 1937 and 1938, on the Lincoln Tunnel job, and also have heard proof as to certain payments made to the defendant Fay in the State of New Jersey. The former testimony, that is as to the Lincoln Tunnel payments, must not be considered by you in any way as evidence of guilt on the part of either of these defendants on any charge except the conspiracy count, and Count 5, which is the count charging extortion from Perini & Sons.

Such testimony, if believed by you, would indicate, or might indicate, a general plan or scheme, but would also constitute knowledge by the witness Perini as to the defendants' power, and the implications involved in the conversation which such witness claims to have taken place about May 12, 1938, with the defendants, in regard to the Seaboard contract and the contract of Perini & Sons.

The testimony regarding payments made in Jersey is offered and received merely as bearing upon the conspiracy count. If true, such payments would not be extortion in New York County, but would be overt acts indicating a scheme or plan to extort.

You have heard the testimony of the witnesses produced by the People and the witnesses produced by the defendants, and you have heard respective counsel point out what in their opinion the facts are, and the inferences you should

draw therefrom. The time has now come when you have to assume your duties, your active duties, as jurors. It is my duty at the present time to explain what I believe the law is, and you are expected to be guided by my definitions and explanations.

[fol. 1050] You are not to consider punishment in the event of conviction, nor any rulings the Court has been called upon to make during the trial. You are the sole and exclusive judges of the facts in this case. The Court has no power to tell you what the facts are, nor whether a particular witness is truthful or untruthful. All those things are for you to determine.

In making such determination, you must preserve a judicial attitude of mind, uninfluenced either by sympathy or prejudice. The People, having accused these defendants of the crimes of conspiracy and extortion, have the burden of proving such accusations, and the defendants are under no obligation to disprove them. These defendants as are all other persons charged with crime, are presumed to be innocent, and such presumption remains until it is broken down, if ever, and destroyed by evidence that convinces you beyond every reasonable doubt—not a doubt of every detail, but if you have a reasonable doubt on any material element in the case, the defendants are entitled to its benefit.

A reasonable doubt means a doubt that is founded on reason, not on guesswork or sympathy, or a desire to avoid an unpleasant duty. It must be such a doubt that one who entertains it can give a good reason for it, which reason is based either upon the evidence in the case, or upon the lack of such evidence. The law does not say that a defendant must be proven guilty beyond every conceivable or possible doubt, for you can conceive a doubt upon almost any topic. Nor does the law require that guilt be proven to a mathematical or absolute certainty. Where human memory is involved, there is no such certainty. It can be and it must [fol. 1051] be reasonably certain that a man is guilty before he can be convicted. All the evidence, when considered by you, must beyond a reasonable doubt exclude or remove every other reasonable hypothesis than that of the defendants' guilt.

You are also the sole and exclusive judges of the credibility or weight which you feel should be given to the testimony of the various witnesses. In considering the credibility of those witnesses, you should take into con-

sideration their appearance, their manner on the stand, any desire or interest they might have in the outcome of this case, or any other possible motive which might influence their testimony. You should also take into consideration the probabilities, the reasonableness of the testimony, and of course whether or not any testimony of any witness has been corroborated by any other facts in the case.

As you know, these defendants are charged with the crimes of conspiracy and extortion. The indictment containing these charges was returned by a Grand Jury of New York County on May 17, 1943. Without reading the indictment verbatim, it is alleged in the conspiracy count that:

"In or about the month of January 1936, and continuously at all times thereafter up to the present time (that is the date of the filing of the indictment), in the County of New York and elsewhere, the said defendants Joseph S. Fay and James Bove, did wilfully, knowingly, unlawfully and corruptly conspire, combine, confederate and agree together * * * to commit a crime, to wit, the crime of extortion."

It is alleged in the indictment that the defendants conspired to extort money from the corporations engaged [fol. 1052] in the construction of, and in manufacturing, processing and supplying materials for the erection of the Delaware Water Supply project of the City of New York. It is alleged that such money was obtained by the wrongful use of force and fear induced by threats to do unlawful acts. The Court won't go into all of the allegations in the indictment, but in a general way, those unlawful acts were to foment and declare strikes among the employees of the contractors by unlawfully and corruptly placing picket lines in front of and near the places of business of said contractors; unlawfully and corruptly using their power to prevent the contractors from entering into contracts with these unions; unlawfully and corruptly using their power to prevent said contractors from employing members of said unions at prevailing rates of wages; unlawfully and corruptly using their power to prevent said contractors from employing efficient, skilled and competent workers; unlawfully and corruptly using their power to prevent said contractors from receiving efficient, skilled, competent and

productive efforts from their workers; and by otherwise unlawfully and corruptly hindering, impeding and interfering with the conduct of the business of the contractors.

It is alleged that they, as part of the cospiracy, demanded and obtained certain sums of money from various corporations, about which I will discuss at a later point. It is claimed in this indictment, or charged in the indictment, that all of the demands alleged to have been made were made under threats by these defendants to said contractors to unlawfully injure their persons and property by foment- [fol. 1053] ing strikes, and the other unlawful acts which I have mentioned. The said count contains six overt acts, which it is claimed the defendants committed in connection with this crime of conspiracy.

The indictment further charges the defendants with six specific crimes of extortion, set forth in Counts Second to Seventh, inclusive. It charges that all of the acts and transactions alleged in each of the counts are connected together and constitute parts of a common scheme and plan.

Now, neither the finding of this indictment nor the indictment itself raises any presumption of guilt against either of these defendants; nor is it proof of anything whatsoever. It is simply a formal, written accusation or charge of the Grand Jury, by which this case was commenced; and this is the first opportunity that the defendants have had to defend themselves against these charges.

As I have stated, the defendants are charged in the first count with conspiring to commit the crime of extortion; that is, to violate Section 850 of the Penal Law of the State of New York. It is not necessary for the People to prove the exact date of the conspiracy, and its existence may be established by proof of acts and declarations of the defendants on different occasions, even though such acts cover a long period, and even though the acts have been separated by a considerable distance in time.

Section 580 of the Penal Law provides, so far as this case is concerned, that if two or more persons conspire to commit a crime, each of them is guilty of a misdemeanor. A conspiracy is a combination of two or more persons, by concerted acts, to accomplish an unlawful purpose, followed [fol. 1054] by one or more overt acts to effect that purpose.

The law says that the agreement to commit the crime, that is, the talk about it, is not conspiracy; but if an overt act is performed, it becomes a conspiracy, even though such

overt act does not carry out the act of conspiracy or amount to a crime.

The conspiracy count, as I have said, sets forth a number of overt acts claimed to have been committed by one or both of these defendants during the time from 1937 up to the time of the filing of the indictment.

Section 398 of the Code of Criminal Procedure provides that upon a trial for conspiracy in a case where an overt act is necessary to constitute the crime, the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, and one or more of the alleged acts be proved; but any overt act not alleged in the indictment may be given in evidence.

Now, the overt acts set forth in the first count of the indictment are, first, that in furtherance of the conspiracy and to effect the objects thereof, the defendant Joseph S. Fay met and conferred with Thomas Joseph Walsh and John S. MacDonald, and obtained from the said MacDonald the sum of $30,000 in the New York Athletic Club, located at 7th Avenue and 59th Street in the County and City of New York, on or about May 7, 1942. The People claim they have established that to your satisfaction, beyond a reasonable doubt.

The second overt act claimed is that, in furtherance of the conspiracy, the defendant Joseph S. Fay met and con- [fol. 1055] ferred with William P. Foss, Jr., and obtained the sum of $2,000 from the said Foss. No proof has been put in as to that overt act, and therefore you are not to consider that charge. The substantive charge of extortion in that regard has already been dismissed by the Court, and you will not consider that specific charge.

Another act charged, the third, is that the defendants met and conferred with Harry F. McLean and Louis R. Perini in the County and City of New York in or about May 1938. You have heard proof on that subject.

Fourth, that the defendants met two other gentlemen at the New Yorker Hotel. There has been no proof of that.

Fifth, that the defendant Bove met and conferred with Miles Killmer, and received the sum of $12,000 in the County of New York, on or about August 22, 1941. You have heard testimony on that subject.

Sixth, that the defendant Fay met and conferred with William J. Brewster and obtained from him the sum of $10,000 in the office of Brewster & Son, at Bogota, New

Jersey, about the month of December 1942. You have heard testimony on that subject.

Now, what is an overt act? An overt act is an open act committed by any person connected with the conspiracy, in pursuance of the agreement to commit such conspiracy. It need not in itself be unlawful. Conspiracy is an agreement, and any overt act bringing it within the requirement of the Statute may be in and of itself insignificant.

It is not necessary that both defendants should have participated in the doing of any particular overt act alleged to [fol. 1056] have been committed in this indictment. It is necessary, however, for you to find one at least of the overt acts charged in the indictment was done by one or both of these defendants to the agreement, or conspiracy, if you find there was a corrupt agreement, and that such act was done in furtherance of the objects of such agreement. If you so find, then that overt act becomes an over- act of both defendants.

If you should find beyond a reasonable doubt that the defendants conspired together to commit the crime of extortion, as alleged in this indictment, Count 1, then each of the defendants is criminally responsible for the acts and declarations of the other defendant to effect the common objects of the conspiracy; and any act done by either of the defendants in pursuance of the original plan with regard to the common object is, in contemplation of law, the act of both.

A conspiracy may be proved by direct or circumstantial evidence, by isolated acts or steps or by declarations of the defendants, lending themselves to a common object. It may be inferred from all the circumstances. Whether or not a conspiracy exists or has been proved in this case, or whether or not the acts and declarations of either the defendant Fay or the deefndant Bove connected him with the conspiracy, is a question of fact for you to determine.

The People claim generally that the evidence established beyond a reasonable doubt the first count in this indictment, that is the misdemeanor count of conspiracy. They claim that the testimony of Walsh, MacDonald, Small, Perini, Brewster and Killmer all indicates a common plan or [fol. 1057] scheme between these two defendants to extort money from these contractors, and that the overt acts have been established in that connection by the testimony of the witnesses just mentioned, as to conferences which took

place in the New York Athletic Club here in New York City about August 1938. They claim that it is clear from that testimony that the defendants did enter into a scheme to extort money from the various contractors on the Delaware Water Supply project, and they claim to have established, in support of such conspiracy, the following overt acts, briefly—I am not attempting to go into all the details at this time, but merely to call your attention to what the People claim they have proved beyond any reasonable doubt as bearing upon this particular count of the conspiracy. At the present time we are talking about that.

They claim that the payment by Perini to Fay of $50,000 in December 1937, and in 1938, the six or seven payments, claimed to have been made, are overt acts which indicate that there was a conspiracy to extort.

They claim that the conference about August 4, 1938, with Walsh, MacDonald and these two defendants is another overt act which you should find indicates a conspiracy; and also the payment of $50,000 which Small testified was paid to Bove on the 19th day of August 1938 as another overt act; and that the conference between Walsh, MacDonald, Small and these defendants the week after March 30, 1939, in the New York Athletic Club was another over act indicating a conspiracy; that the conference with Perini and these defendants in some hotel in New York, which Perini did not identify, on the 12th day of May 1938, was another overt [fol. 1058] act proved beyond any reasonable doubt; that the conversation between Brewster and these defendants in the Hotel Commodore in July of 1939 was an overt act proved beyond any reasonable doubt; and that the payments testified to by Brewster—that of September 1939 of $12,000 to Bove, and $10,000 in October 1939, and $10,000 in October 1940, and $10,000 in 1941, all claimed to have been made at Bogota, New Jersey, to Mr. Fay, and also three payments of $5,000 claimed to have been made in the year 1939, October, and in 1940 and 1941 to Mr. Fay at Bogota—those are all overt acts which indicate a conspiracy; and also and finally, the conversation had at Miami, Florida, between Brewster and Mr. Fay in regard to the Neversink contract, in which $30,000 was claimed to have been demanded was another overt act which indicated a conspiracy; and that the three payments testified to of $10,000 each—one made in April 1941, another the latter

part of 1941, and the third in the latter part of 1942—all made at Bogota, New Jersey, to Mr. Fay—were overt acts.

The People claim that these various acts, conferences, payments, are all acts which indicate beyond any reasonable doubt the existence of the conspiracy set forth in this indictment. The People claim that $368,000 has been proved in this case beyond any reasonable doubt to have been paid to these defendants during this time alleged in the indictment.

The People also claim from all of the evidence that it is clear that these payments were made by these various contractors as a result of threats, which induced fear, and therefore that that is illegal and constitutes a conspiracy; and the various acts of payment constitute the crime of extortion.

[fol. 1059] The defendants, on the other hand, claim that no money was extorted; that there was no plan or agreement or scheme or combination between these two defendants to extort moneys from these contractors, or anyone else. They claim, on the other hand, that they have established beyond any reasonable doubt that this money was not extorted from these contractors; that these payments were made willingly by each of these contractors, for affirmative and constructive assistance to be rendered by these defendants during the progress of these huge contracts. They claim that these payments were made by these contractors because of the nationally known ability of these defendants—and Fay at least was recognized as having a reputation for honesty and fair dealing—the defendants claim that these payments were made, whether legal or illegal, to prevent unauthorized strikes; that they were not paid or demanded in order that these payers, these contractors, should go along smoothly and not have any strikes, but that they were paid to these leaders to prevent unauthorized strikes such as the one you heard described during this lawsuit; that they, in consideration of this amount of money, were to advise, plan, control the labor situation so that all jurisdictional disputes would be avoided.

They claim further, the defendants, that these contractors who took the stand here, testified against these defendants to save their own skins; that they were afraid of a bribery charge, and elected to place the blame on these defendants, charging them with extortion, rather than to admit that they themselves were guilty of bribing union representa-

tives—because there is a statute which you have heard discussed at considerable length by counsel for the defendants. [fol. 1060] Section 380 of the Penal Law provides that a person who gives money—not the person who receives it, but any person who gives money—to a duly appointed representative of a labor organization, with the intent to influence him in respect to any of his acts or duties as such labor representative, or to induce him to prevent or cause a strike by the employees of such contractor, is guilty of a misdemeanor called "bribery of a labor representative."

The defendants claim that the mere payment by these contractors, or the receipt by the defendants of this money, was not extortion. Of course that is true. If that is all there is to this case—that this money was paid by these contractors to these defendants—if you find that to be the situation, it was not forced out of them, there were no threats, no fear, but it was purely a bribe, no matter how illegal it might be on the part of the givers, it constitutes no crime of extortion against these defendants, and your verdict should be that of acquittal, if you find that to be the case.

The defendants further claim that the contractors got good service for their money, and that the contractors were not interested in where the money went or how it was divided, if it were divided. They point out that there were no complaints made by these contractors that they had been gypped out of this money. It is apparent that these contractors were reluctant witnesses.

The defendants also point to the fact that one at least of these contractors testified that no threats were made against him. Of course it is not for the contractor to say whether the acts and conversations amount to an implied threat or not. That is what you are for. It is for you to [fol. 1061] say whether the conversations, under all of the facts and circumstances, were implied threats. It is not what one of the contractors might say on the stand at this time. It is what the situation was back in 1938 and 1939, 1940 and 1941, that you must take into consideration in making up your minds whether or not there were any implied threats.

Generally, I have tried to point out what the respective claims are of the People and of the defendants, so that, while there is a lot of language in this indictment and there has been a lot of testimony, and you have heard about a lot

of money (and the sums paid are rather considerable even for New York), still there is just one simple issue in this lawsuit: Was the money paid as a bribe, willingly, for services which the contractors expected to receive? Or was it paid over by threats which the defendants conveyed to the contractors? That is the sole issue in this lawsuit.

The difference between bribery and extortion is that in bribery the payment is made voluntarily, to induce the recipient to favor the giver. In extortion the payment is not voluntary, but is the result of fear induced by force or threats made by the recipient. The giver in extortion consents, but not of his own desire, but as the result of pressure; and as soon as the element of threat is present, it becomes extortion.

You have heard testimony here as to one of the contractors, Perini. There is no question but what he has been convicted of a crime. He pled guilty to a violation of the Income Tax Law, and you have a right to consider that fact in determining what weight you desire to give to his testimony. His conviction on that charge has no bearing whatever on the weight that you desire to give to the [fol. 1062] testimony of any other witness in the case; it affects only his testimony. If you conclude he is telling the truth upon this trial, you may act upon his testimony, and render a verdict based thereon, notwithstanding such prior conviction; but you should scrutinize his testimony carefully to determine whether or not he has been truthful on this trial.

As I say, the issue is narrow in this case. The People claim the inference to be drawn from the words used by these defendants on these various occasions—and this applies to every count in the indictment—I don't intend to repeat each particular charge of extortion—they are all in the same language, they are all claimed to have been made, these threats, in the same way, different places, different amounts—but the People claim that the only reasonable inference to be drawn from these various words of the defendants on these different occasions is where they said, "If you pay, you will have a smooth running job, you will have no labor troubles"—words to that effect—about the length of time these contracts were going to take—the conversation about sometimes the men became unruly—and you will recall the testimony—it was rather brief and it has been reviewed by counsel on both sides, and the Court does not intend to go into it a third time—but generally, the

People claim that where the defendants used the words that "if you pay you will have no trouble," the implication is that "If you do not pay, you will have trouble."

Now, if you find that the inference is the words were to be construed as they were uttered, without taking into consideration the facts and circumstances—the power of these [fol. 1063] men—that this was just a casual conversation in regard to these contracts—why, then of course there was no threat. On the other hand, if you find from the testimony that there was an implied threat, you have a right to say so. And if you find there was a threat, why, then, of course, that would constitute, if acted upon and produced fear, and money paid as the result—that would constitute the crime of extortion.

The People claim to have proved that beyond a reasonable doubt by the testimony of those various contractors; and by facts and circumstances from which only one logical and reasonable inference can be drawn, that is according to the People, that the defendants during this period from 1937 to 1943 did conspire to violate Section 850 of the Penal Law.

The People contend that all the facts and circumstances developed here proving the charges made in the extortion counts are facts and circumstances which also prove that a conspiracy existed between these two defendants.

As I have said, the defense denies this is so, and claims that the evidence offered by the People should be rejected; that the People have failed to prove beyond a reasonable doubt facts and circumstances from which any inference of guilt can be drawn; but on the contrary, that the facts and circumstances are as consistent with innocence as with guilt; that therefore the jury should draw the inference of innocence, and acquit the defendants on this charge because there is a reasonable doubt of their guilt.

To sustain the charge made against the defendants in the first count, the People must establish beyond a reasonable doubt, first, that the defendants conspired to commit [fol. 1064] a crime, that is, extortion, as I have defined it. Second, that the defendants were actuated by a criminal intent. Such intent is a question for you to determine. It may be inferred from all the facts and circumstances. It is a necessary element of the crime of conspiracy, and means guilty knowledge.

Before you can convict these defendants or either of them of being parties to this conspiracy, you must find that they had knowledge of the unlawful purpose of the conspiracy, and agreed to it. If either of these defendants had guilty knowledge or criminal intent, and the other elements necessary to constitute the crime of conspiracy are proved to your satisfaction beyond a reasonable doubt, you would be warranted in finding such defendant guilty of the crime of conspiracy.

The People contend that if you find that an unlawful agreement was formed and existed between these defendants to violate this Section 850 of the Penal law, then the conclusion must be inescapable that the defendants were participating in that conspiracy with criminal intent.

The People claim that the proof shows that the defendants, and each of them, knew they were conspiring together to commit the crime of extortion, and that their acts and conduct showed this.

The defense denies this and claims the defendants merely assisted the contractors at their request. They claim that their activities were merely legitimate activities of labor officials; that any money received by them was not extortion, but paid willingly, even though it did constitute bribery on the part of the giver.

[fol. 1065] You are to take all the evidence, consider all the facts and circumstances and then decide whether or not the defendants entered into a corrupt agreement or understanding. If you find they did, that that agreement was to commit a crime, that is to violate the law of extortion; that the defendants were actuated by a criminal intent—that is had guilty knowledge—if you find beyond a reasonable doubt that one or more overt acts as charged in the indictment were committed by either of these defendants to further effect that conspiracy during the period in which it was in existence, then you would be warranted in finding the defendants guilty on this count. If, for any reason arising from the evidence or lack of it, you have a reasonable doubt of the establishment of any of the elements of this offense, you must give the defendants the benefits of such doubt, and acquit them.

If you find beyond a reasonable doubt that such conspiracy was in existence, either defendant who participated in it may be convicted, not only of the crime of conspiracy

as charged in the first count of this indictment, but also of any crime of extortion committed by the conspirators in the pursuance of the conspiracy, provided you find evidence of such crime beyond a reasonable doubt.

If you find beyond a reasonable doubt that the defendants were engaged in a conspiracy to extort, but *if* the People have not proved at least one overt act was committed pursuant to this conspiracy, that fact would bar the conviction of either defendant of the crime of conspiracy, even though you think such a crime had been committed.

[fol. 1066] Now, after considering the conspiracy count, you should proceed to consider the several charges of extortion. Each of these counts is an independent charge. You may acquit on the conspiracy and convict on any or all of the extortion charges; or you may acquite on any or all of the extortion charges and convict on the conspiracy charge. Each of these counts is a separate crime, charged separately, and should be considered separately by you in your deliberations and you should not permit testimony as to a payment, for instance, on one of the charges, to influence you in your consideration of the charge of payment in another instance. They have no connection, they are separate charges. However, you are entitled to take into consideration upon the question of conspiracy, and upon the question of fear, the previous knowledge that any of these witnesses might have had as to the power of these defendants, or as to any previous conduct of either of these defendants along similar lines, in connection with other contracts. Of course, if a man has an experience with another person that goes along a certain line, when he comes into contact with that same person again in a similar situation, he doesn't have to have every word repeated. He has knowledge of what was expected, sometimes, and of course you can't remove that from his mind.

Now, as to extortion. Extortion is the obtaining of the property of another, or the property of a corporation from an officer, agent or employee thereof, with his consent, induced by wrongful force or fear—Fear such as will constitute extortion may be induced by oral or written threats [fol. 1067] to do a number of things, and one of these things is to do an unlawful injury to the property of the individual threatened; or to a corporation of which he may be an officer, or member, or stockholder.

To constitute extortion, the following elements must be proved beyond a reasonable doubt:

1. Property, which includes money, must have been obtained by the persons participating in the extortion.

2. The victim must have parted with his property, with his consent.

3. The consent must have been induced by force or fear. If induced by fear, the fear must have been induced by the use of threats, either oral or written, expressed or implied, direct or indirect, made by one of the defendants; and the threats must be threats to do an unlawful injury to the property or person of the victim, or the corporation by which he is employed, or of which he is a stockholder. And the threats must be made with the intent to induce fear in the person to whom they were directed.

Extortion involves criminal intent, and the criminal intent involves the attempt, by means of threats of an unlawful character emanating from the extortionist, and addressed to the victim, to wilfully and wrongfully obtain money or property from the victim, with his consent. Whose property or money is obtained, so long as it is obtained from the victim, is immaterial. Nor is it material whether or not the person who obtains money keeps it for himself or distributes it among the participants of the crime. It is also immaterial whether the participants in a conspiracy to extort share the proceeds equally or un- [fol. 1068] equally, or whether one gets nothing.

The statute requires proof of threats of an unlawful injury. Threats to do an innocent or lawful act may become unlawful if made with an unlawful motive, for an unlawful purpose. Strikes by labor unions, and picketing are lawful and proper in themselves when used for lawful and legitimate purposes, and when carried out according to law. They may be lawful when used for legitimate purposes, even though they are used unreasonably, arbitrarily, and harshly.

Any threats, however, express or implied, direct or indirect, to call a strike or to place a picket line, or to prevent by union action a person from lawfully carrying out his business, if such a threat is made with the intent to induce fear, and to cause the victim as the result to pay money—in other words, to extort—would be an unlawful threat to

do an unlawful injury. In other words, the same threats which are lawful when made to enforce the lawful demands of a union, even though those demands may be considered unreasonable and arbitrary, may become unlawful threats when made or used for the unlawful purpose of compelling the person to whom the threat is made, to part with his money.

The form of the threat is immaterial. Any language or acts, or any combination of language and acts which convey a threat that an injury will occur to the person or property of the victim, or to his corporation, unless money is forthcoming would be sufficient. The threat may be read from all the surrounding circumstances. The word "property" includes a man's business, and any interference with or loss of business is an injury to property. Unlawful picket-[fol. 1069] ing, unlawful strikes, or unlawful interference with the work of a construction contract may result in such injury, because those things are calculated to and do cause a loss of income and business. The amount of the loss threatened or the extent of the injury threatened is immaterial.

The People claim in this case it was not necessary for the defendants to indulge in any extravagant or vicious language to impress these contractors with the fact the defendants had the power to affect or injure their property or business. The People claim that the contractors knew the defendants had power to cause them loss, and that the same power which the defendants had used effectively in the past could be used to unlawfully interfere with their business, if they did not submit to their demands.

The People claim that even an implied threat or a suggestion of injury coming from the defendants, was, because of their known power, potent and compelling, and that one of the things which these men feared most was the halting of their contracts—all the things the People claim the complaining witnesses knew these defendants could easily accomplish. The People claim it was not necessary to make open and specific oral threats to do any particular unlawful injury to the busines of the contractors, but that the defendants could by general language and by implication, suggestion and innuendo, easily and clearly convey a threat to do injury to the business of the contractor.

The defendants claim and contend that no threat to do an unlawful injury or to improperly interfere with the

property or business of any person was ever made by these defendants, or either of them, directly or indirectly. They claim also that while the defendants may have had the [fol. 1070] power through their respective unions to interfere with the business of these contractors, that that power never was exercised for those purposes, but was exercised only for the purpose of cooperation with these respective contractors.

The defendants claim that the contractors were willing to have the defendants act as mediators and arbitrators to bring harmony and peace out of trouble, to arrange matters so that they could get the best terms and conditions possible for the unions. They also claim they were in a position to do this because of their experience as union officials.

Even if you find that one or either of these defendants used the power of his union arbitrarily, you would not be justified in convicting him for that reason. Only if you conclude beyond a reasonable doubt that such defendant was a party to the conspiracy mentioned in this indictment and that he used the power of his union for an unlawful purpose—that is, for the commission of the crime of extortion, as I defined that crime to you, would you be justified in adjudging him guilty.

The statute requires that the unlawful threats should put the victim in such fear as to induce him to consent to the payment of money or other property, as compared with physical or forceful taking. Of course, if these defendants took money from these contractors by force unlawfully, that would be robbery. But where it is taken by the force of threat which produces fear, that constitutes extortion. Consent within the meaning of the statute exists even though in the mind of the victim it may be no more than a choice between payment and a greater evil.

If you should find that any of these contractors parted [fol. 1071] with his money on a threat by these defendants to do an unlawful injury, and that, had it not been for such a threat he would not have parted with his money, you have the consent which the statute calls for. In other words, the threats created or induced a fear which led to the payment. That is the claim of the People.

If such fear existed, it does not matter whether the contractor expected any benefit from the payment or not, or whether any benefit actually came as the result of the payment. If, on the other hand, you find that no threats were

made, the crime of extortion has not been proved, and in such case you must acquit the defendants of the crime of extortion.

If you find that threats were made, but in spite of the threats the contractor or alleged victim had no fear but paid only because he desired certain benefits which he expected to receive, then the element of the crime of extortion would not be proved, and you must acquit.

In this indictment, in each count charging extortion, there are a number of threats set forth. It is not necessary to prove that all of these threats were made in any particular case. It is sufficient if you believe that any threats were made. If you find that one such threat was made in each case, that is sufficient to constitute the crime of extortion in each case. If you find that no unlawful threat whatever was made prior to the payment, the crime of extortion has not been established.

Whether a particular payment was established or made willingly, as I have already pointed out, if you find that it was made, is a question of fact to be determined by you in the light of all the facts and circumstances relating to that [fol. 1072] particular transaction, and on the testimony bearing on the alleged conspiracy.

The indictment, in addition to the conspiracy count, charges six specific crimes of extortion. They are all charged in the same general language. For instance, in the second count: "The defendants in the County of New York from on or about April 1, 1938, to on or about July 1, 1942, wrongfully, wilfully and extortively obtained the sum of approximately $125,000 in currency of the United States of America, the property of the Seaboard Construction Corporation * * *" Now, as far as that count is concerned, there is no proof in this case that that money was paid over by the Seaboard, so I am dismissing the charge of extortion as set forth in that count, but I am submitting to you the second count on a charge of attempt to extort.

Under the Penal Law, an act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime. And where there is an attempt to commit the crime, any act done in the process of the consummation of the offense and of such a character that in the ordinary course a crime would have been consummated had not the interruption intervened, is a sufficient overt act to justify conviction for an attempt.

In connection with Count 2, you will take into consideration the testimony of the witness Perini that he had a conversation at a hotel in New York City. You recall that Perini was an officer of both the Seaboard Construction Corporation and of B. Perini & Sons, his own corporation; that he had the talk with the defendants which he testified to, and that he agreed to report the conversation to McLean, [fol. 1073] the president of the Seaboard Construction Corporation, and there is testimony that he did so report.

Now, if you find that there was a threat in the conversation, if that conversation can be construed so that if the Seaboard did not pay the sum demanded, which was claimed to be $125,000, then of course—if there was a threat implied there, and that money or a portion of it was parted with as the result—why, that would, if you find that beyond a reasonable doubt, amount to an attempt to extort. But on the charge of extortion there is no proof of any payment by the Seaboard Construction Corporation.

On the third count—that is the Mason & Hanger charge—The People claim that the testimony indicates beyond a reasonable doubt that the witness Brewster met the defendants in August 1939 and that they demanded $12,000 a year—$60,000 for five years—on the Mason & Hanger contract, and you recall that Killmer came to the hotel later and had a conversation with the defendants in regard thereto. You also recall the testimony that Brewster paid $12,000 for the Mason & Hanger Company, and was later reimbursed. There is also testimony that $12,000 was paid in September of 1939, and that Killmer made the two following payments in 1940 and 1941 at 500 Fifth Avenue.

There is also some testimony in connection with that charge that the witness Killmer testified that no threats were used. That of course is Mr. Killmer's construction of what a threat was, on that occasion. You are the sole judges as to whether or not the language used under the circumstances amounted to a threat, and whether or not the pay-[fol. 1074] ments were made by Mason & Hanger through fear of labor trouble if the payments were not made. That is your province, not Killmer's. You may take into consideration, however, that he said that no threats were used, but you are also entitled to your own opinion as to whether or not threats were used.

On Count 4, which is the charge of extortion from the New York Traprock Corporation, no proof was produced

by the People to substantiate that charge. The reasons are immaterial; no proof was given, and you are not to consider it. The Court has dismissed the count, and you are directed to bring in a verdict of not guilty, that is, to acquit these defendants on that charge, that is on Count 4.

When you come to Count 5, that is the B. Perini & Sons matter, the same testimony applies to that. The Court has already mentioned the testimony of Perini, and the fact he was convicted of a crime. He testified that he had this conversation, that the defendants demanded $50,000. You will recall that Mr. Fay, later in that conversation, agreed with the witness Perini—that is, according to Perini—that $50,000 was a little too heavy, and 25 or 30 would be more in line, and it was agreed, according to Perini, that he should pay $25,000, and he testified that he did pay Bove $5,000 in his office on 42nd Street a few weeks later, and made six or seven payments during the next year and a half. He paid $25,000 in all. Of course, if you believe that testimony and that those payments were made as the result of fear induced by threats of labor trouble, and were not voluntary, why, that of course would constitute extortion under the Court's definition.

In regard to Count 6, that is the count in which the Peo- [fol. 1075] ple claim that $150,000 was obtained from the Associated Contractors. You recall that most of the testimony, or at least a great deal of testimony was introduced here by the People to show that after the Associated Contractors got the contract, about the 4th day of August, 1938, that Walsh and MacDonald met the defendants at the New York Athletic Club. You will recall the testimony on that subject. They demanded, according to these witnesses, $250,000, and finally agreed on $150,000. You will recall the testimony of the witness Small that he went to the Bank of Manhattan, the Long Island Branch, on the 19th day of August 1938, and cashed a check for $50,000, and took the cash and gave it to Bove in New York on that day. He testified also that he made 13 payments in all to the defendant Bove, with the exception of one which he made to the defendant Fay. The total amount paid on that contract was $150,000, as the Court recalls. You will use your own recollection.

There is also the 7th count which had to do with the alleged extortion of $125,000 from the Walsh Construction Company. Of course that conversation was claimed by

Walsh and MacDonald to have taken place in the New York Athletic Club about the 7th of April 1939, when $125,000 was claimed to have been demanded, and they finally agreed to pay $75,000, and if the contract was profitable, they would raise it to $100,000. You also recall testimony on that subject, that all but $13,000 was paid—$62,000 was paid, and the balance of $13,000 was not paid. You will recall the testimony on that subject. That is the seventh count.

Now, members of the jury, you have heard the testimony [fol. 1076] in this case. I have not attempted to give all of it, but just enough for you to understand the claims of each side. It is for you to say from all the evidence whether or not you believe that all of these contractors paid this money to the defendants, and if so the reason they paid it.

If you believe that the money was paid over a period of years, to avoid having the contracts interfered with, without any threats on the part of the defendants—or if there were threats, that they produced no fear—even if you find the payments were bribes, as I have said before, you must acquit.

If, however, you believe beyond a reasonable doubt that the defendants approached these contractors and demanded these various sums of money from them, and expressly or impliedly threatened that there would be trouble coming to these contractors, as the result of labor trouble or otherwise; and if you further believe beyond a reasonable doubt that in so conducting themselves the defendants were acting in pursuance and in furtherance of the common plan or scheme already referred to and set forth in Count 1 of the indictment—if you further find that these contractors understood the conduct and the statements of the defendants to be threats to do an unlawful injury and it was meant that they should understand it that way; if these contractors were put in fear, and made the payments that were demanded, then the crime of extortion would be made out and you would be justified in finding these defendants at that time guilty of the crime of extortion as well as conspiracy.

Now, in this case, the defendants have not taken the stand. [fol. 1077] Under the law of the State of New York, each of these defendants has a right to go upon the witness stand and testify in his own behalf if he desired to do so. Neither of these defendants chose to testify, and under our law, no adverse presumption is to arise from such fact. Neither should the defendants be prejudiced in any way by their

failure to testify in this trial. The law is that the defendant in any case may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him. The reason for that, of course, as I have already pointed out is that there is no burden on the defendant to prove his innocence. The People have the burden of proving his guilt beyond a reasonable doubt. If the defendant elects to take that course, and the People have failed to prove his guilt beyond a reasonable doubt, you should not punish either of these defendants in any way for his election to take that course.

Now, you have had testimony here of certain character witnesses produced by one of the defendants—not both, just the defendant Fay. He has produced upon the trial certain witnesses who testified that his reputation, his general reputation as to honesty and fair dealing, from the speech of people, is good. The defendant Fay claims that that character testimony offered by him is sufficient in and of itself to create in your mind a reasonable doubt as to his guilt. That contention is not entirely correct. The law is that such testimony, when considered in connection with all the other evidence in the case, may be sufficient to create a reasonable doubt, where, without it, no such doubt would exist.

[fol. 1078] In considering testimony of that kind, you may bear in mind there is a marked distinction between character and reputation. Character is what a man is. Reputation is what his friends and neighbors think he is. Character is interior; reputation is exterior. In other words, character consists of qualities which constitute the individual, while reputation is the sum of the opinions of others concerning the individual.

The testimony of the good reputation of this defendant Fay was received by the Court, and should be considered by you, on the question of the guilt or innocence of that defendant, (His character has nothing whatever to do with the defense of the other defendant, Bove)—on the theory that a person who has always borne a good reputation is not likely to commit a crime, or a crime such as this defendant is charged with. But if the guilt of the defendant is established beyond any reasonable doubt by other evidence in the case, considered in connection with the character evidence, then the fact that the defendant heretofore bore a good reputation cannot save him from the consequences of his

unlawful act. In other words, a person cannot commit his first crime, no matter how long he has borne a good name and a good reputation among his neighbors, and then plead that his good reputation is a defense.

In my charge, I have necessarily mentioned the direct examination at a greater length, perhaps, than the cross-examination, and perhaps I have emphasized the testimony offered here by the People at considerable length and at greater length than I have mentioned the testimony of the defendants' witnesses. That is, of course, due to the fact that there have been more witnesses produced by the Peo-[fol. 1079] ple here; their testimony has been lengthy, and the testimony on the part of the defendants has been limited to three or four witnesses whose testimony has not been particularly lengthy.

You, however, in making your determination, are to consider all the evidence given during the direct and cross examination, as well as any documentary proof or exhibits that may be submitted to you. If the recollection of the Court as to any facts differs from your own recollection, it is your recollection which must govern you. As I say, you are to first consider the question as to the guilt or innocence of these defendants under the conspiracy count; and then, no matter what your verdict may be on that count, you take up the various counts which I have directed your attention to, and take up the evidence on each charge separately as though you were having a separate trial. They are separate crimes claimed to have been committed at different times, and should be considered by you separately and independently of all the other testimony, except such testimony as bears on the intent or the motive, or the knowledge of any particular witness. Of course, that can't be separated.

You will disregard any rulings made by the Court during this trial; the denial of any motions made by counsel; overruling or sustaining of any objections of counsel on either side. All arguments on all questions there involved, involve only matters of law and the admissibility of evidence.

You should also disregard the answers of any witness that have been stricken out, and all other matters which the [fol. 1080] Court has ordered stricken out of the record, or not permitted in evidence. Where the Court has sustained objection to a question, you must draw no inference from the question itself, or from the fact that the Court sustained

the objection; nor should you speculate on what the answer might have been to any particular question which was not permitted to be answered. No question is evidence. It is the answer that is evidence.

The fact that I have referred in my charge here to some testimony and not to other parts that you have heard during the trial does not indicate any opinion on my part as to the importance of the portions referred to. You are the sole judges of the importance, the relative importance, of the testimony of the various witnesses. The Court has merely attempted to point out and review very briefly and sketchily the different claims with respect to the parties.

With the consent of counsel, the Court intends to submit to you the six counts which you are to consider. As I have said, each count is to be considered separately, and you may bring in a verdict, either guilty or not guilty, as to each count. I will submit these to counsel at the present time, so that if you have no objection I am going to submit them to the jury.

(A sheet was handed to each counsel.)

The Court (Continuing): Now, members of the jury, take this case and decide it upon the evidence, without prejudice or bias, with the sole desire of eliciting the truth, and establishing such truth by a fair verdict. As I have said, it is important to both the People and the defendants. Each is entitled to the same consideration at your hands. From [fol. 1081], your careful attention to the charge and the summaries, and the introduction of evidence, I know that each is going to receive the same consideration at your hands.

It is hard for a jury to acquit defendants. It is hard for a jury to convict defendants; but under your oaths and under the law of the State of New York, that duty is yours and must be borne by you. Counsel for the defendants have ably conducted their respective sides of this case. The Court has endeavored to point out to you what in his opinion the law is that governs your deliberations. It now becomes your solemn duty to determine this case on the testimony that you have heard in this court room, without regard to any outside influence, without regard to any opinions that you may have one way or the other on labor or-

ganizations, their methods, or what has taken place in the past.

If you acquit these defendants, they will be relieved of any stigma or disgrace connected with these charges. On the other hand, if they are convicted, that fact will not be your responsibility, but will be the result of their own acts.

Now, take this case and decide it as you would any other matter which might seriously affect your own consideration. Any exceptions? Any requests?

REQUESTS TO CHARGE—EXCEPTIONS

Mr. McGeehan: May it please the Court, I want to point out to the Court just one place here where your Honor, in reciting the claims of the defense, stated that they claimed the evidence establishes beyond a reasonable doubt that these payments were made willingly by the contractors, and so forth.

The Court: "With reasonable doubt" would be out.

[fol. 1082] Mr. McGeehan: You later stated the rule——

The Court: They have no burden. It is their claim. They don't have to establish it beyond any reasonable doubt. They just have to establish, or, they don't even have to establish it; the burden is on the People at all times to establish their guilt beyond a reasonable doubt. I merely pointed out what their contention is, as to how the jury should infer the facts.

Mr. McGeehan: Then that was a mere inadvertence, I assume, those words?

The Court: Yes.

Mr. McGeehan: Just one other thing, your Honor. In the definition of extortion, I wish to take exception to that on the ground that it includes words related to the quality or nature of threats, not included within the statute and code. I request the charge of the Court specifically to the jury for the definition of extortion by the Statute.

The Court: All right. Section 850 of the Penal Law defines extortion as follows:

"Extortion is the obtaining of a property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right."

Mr. McGeehan: The objection had to do with what the nature of threats would be, which comes in the next section.

The Court: Section 851: "Fear, such as will constitute extortion, may be induced by an oral or written threat: 1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or to any [fol. 1083] member of his family, or to a corporation of which he shall be an officer, stockholder, employee or agent——"

Mr. McGeehan: I think that is all that is referable.

The Court: That is all. That is the statutory provision as to what constitutes a threat. Anything further?

Mr. McGeehan: Just one thing further: Your Honor, in pursuance of the definition, said that threats to do an innocent or lawful act may become unlawful if used for an unlawful purpose—my objection being that a threat to do an innocent or lawful act does not constitute a violation of the extortion act.

The Court: I decline to modify the charge. You have an exception.

Mr. McGeehan: Thank you very much.

Mr. Polakoff: May it please your Honor, I have one suggestion. I believe in substance your Honor charged, referring to the conversation between the contractors and the defendants, in effect that it was said, "If you pay, you won't have any trouble," and then your Honor said, leaving an inference that if you don't pay you will have trouble.

The Court: I stated that that was the inference which the People claimed should be taken from that.

Mr. Polakoff: May I respectfully ask your Honor to charge, in addition thereto, that if the trouble so inferred was meant and understood as the regular trouble that usually occurs on jobs, and not to be specifically caused by the defendants, then in that event there were no threats made by the defendants, directly or inferentially.

[fol. 1084] The Court: Will the stenographer please read that?

(The stenographer thereupon read Mr. Polakoff's request.)

The Court: I so charge. Any requests?

Mr. Hogan: No requests.

The Court: May the jury have those counts I have set forth here?

Mr. McGeehan: No objection to them.

The Court: At this time, will the defendants consent that the jury have the exhibits?

Mr. Polakoff: Yes, your Honor.

The Court: If they require them they may have them. At this time, of course, the two alternate jurors are discharged from further service. The law requires that the case be submitted to 12 jurors. The Court desires to express his thanks to you for your patient attendance here, and attention, and you are now discharged from any further responsibility. The other twelve jurors may retire.

(The twelve jurors thereupon retired, it being 11:21 A. M.)

INSTRUCTIONS TO JURY

(At 12.52 o'clock p. m., the Court received the following communication in writing from the jury:

"Definition of conspiracy in Judge's Charge.")

(The jurors were recalled to the courtroom and resumed their seats in the jury box.)

(Both defendants and all counsel were present.)

The Court: Mr. Foreman, I understand that you desire some further instructions?

The Foreman: Yes, sir.

The Court: On the definition of conspiracy?

[fol. 1085] The Foreman: Yes, sir. There is considerable discussion, and it needs clarification.

The Court: Section 580 of the Penal Law of the State provides as follows:

"If two or more persons conspire to commit a crime, each of them is guilty of a misdemeanor."

That is the definition, so far as it applies to this case.

"A conspiracy is a combination of two or more persons" —(it takes two—it can be more)—"by concerted actions to accomplish an unlawful purpose, followed by one or more overt acts to effect that purpose."

The law has been interpreted to mean that the agreement to commit the crime—that is, the talk about it—is not conspiracy alone—that talk alone is not conspiracy. But if an overt act is performed, it becomes a conspiracy, even though such overt act does not carry out the conspiracy so that a crime is actually committed—another crime.

And Section 398 of the Code of Criminal Procedure provides that upon a trial for conspiracy, in a case where an overt act is necessary to constitute the crime—that is, a case like this—the defendants cannot be convicted, unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved. But any overt act not alleged in the indictment, may be given in evidence.

Now, is there anything further? That is the definition and the construction of the conspiracy statute.

[fol. 1086] The Foreman: Your Honor, I think in—we recall, in your charge, where there are a number of indictments, it would help to clarify our thinking if you would refer a little more in detail to that part in which you mentioned the consideration of the various indictments, with their relation to the No. 1, regarding conspiracy. I believe that would help to clarify it.

The Court: Under the law, the indictment must charge one—at least one overt act, before you can convict of conspiracy. The indictment in this case alleges or sets forth a half dozen different acts, which the People claim are acts which indicate a conspiracy. It is necessary, in order to convict of the misdemeanor, conspiracy—you must find that at least one act, in addition to any talk the defendants may have had between themselves or any plan that they arranged—the People must prove beyond a reasonable doubt that at least one act took place, one overt act. And, of course, an overt act is an act committed by any person—that would be, in this case, either defendant—connected with a conspiracy, in pursuance of the agreement to commit the conspiracy. And I pointed out that in addition to the overt acts set forth in the indictment, which I referred to, and being the various meetings at these various hotels and places with the defendants, which the contractors had—those are overt acts, if you find them; and, of course, the indictment sets forth six charges of extortion, five of which are submitted—or four submitted to you, and one attempted extortion. Those also, if you find beyond a reasonable doubt that those crimes were committed—those acts were committed—those would be overt acts in connection with the conspiracy count.

[fol. 1087] So that you can take into consideration any of the conversations or any of the payments of money,

that the testimony has brought forth here, in consideration of the conspiracy—whether or not there was a plan to do that. That is, any of those. The People are only bound to prove one. If you find that these two defendants did agree among themselves or plan among themselves to extort money, then, in addition to their plan or their talk, the People would have to establish one act, one conversation, or one taking of the money. That would be sufficient to convict on the conspiracy count.

When you come to the extortion count, the proof on each count must be considered separately. You can't convict on the Seaboard extortion—I took that away from you, anyway. But you can't convict on the Walsh extortion charges by what took place between somebody else—Perini, and the defendants. That evidence only applies to the Perini extortion charge, and so forth. But all of these acts may be considered by you upon the question of conspiracy. If you find there was no conspiracy, why, then, that count is out. If you find there was extortion, those counts have to be taken up by themselves, separately, each case as though it were a separate case.

Is there anything further?

The Foremen: That answers the specific questions.

The Court: You may retire.

Mr. McGeehan: May it please the Court, before the jury retires, I would ask the Court to charge, in answer to the question, that the object of the alleged conspiracy alleged in the indictment is to extort money, and that any evidence [fol. 1088] upon that would have to be considered in the light of what constitutes extortion. In other words, there could be no conspiracy unless the object of it was to criminally extort money by threats and by the use of force.

The Court: That is true. The conspiracy is charged as a conspiracy to extort money from these contractors—not to rob somebody or set fire to a building, but to extort. And only evidence which deals with extortion would be overt acts in connection with the conspiracy.

(The jury again retired at 1:01 P. M.)

(At 5:10 P. M. the Court received the following communication in writing from the jury:

"We request copy of complete testimony on Indictments 2 and 5. Also 3.

"If possible would like record in jury room."

(The jury were recalled to the court room and resumed their seats in the jury box. Both defendants and all counsel were present.)

The Court: Mr. Foreman, I understand you desire to have some portion of the testimony read.

The Foreman: The jury would like to hear the testimony of Mr. Perini with respect to both indictments 2 and 5.

The Court: Will counsel stipulate the stenographer can read that from the typed record?

Mr. Fitzsimmons: Correct.

Mr. Hogan: Surely.

The Court: That will save time. Two is the Seaboard, isn't it?

Mr. Fitzsimmons: Correct.

The Court: And 5 is B. Perini & Sons?

Mr. Fitzsimmons: Correct.

[fol. 1089] The Court: Page 785, is that where it starts?

Mr. Hogan: Yes, your Honor.

The Court: All right.

(The stenographer read to the jury from the testimony of Louis Perini from page 785 to top of page 831 of the transcript.)

The Foreman: Your Honor, our question has been answered.

The Court: All right. Does the jury want any more testimony? Does anybody want any more?

The Foreman: No.

The Court: All right, you may retire.

(The jury again retired at 6:00 P. M.

(At 12:30 o'clock a. m., March 15, 1945, the Court received the following communication in writing from the jury:

"We have reached a decision on all counts but one, and it appears necessary to hear additional testimony before deliberating further on the remaining count. We await instruction.")

(The jury were recalled to the courtroom and resumed their seats in the jury box. Both defendants and all counsel were present.)

The Court: Mr. Foreman, do you desire some further instructions?

The Foreman: Your Honor, it appears to us that in the deliberation we do need some additional testimony. Some of the jurors have expressed the fact that they are rather tired—and would prefer hearing the testimony in the morning; but it seems that we do need some additional testimony.

The Court: I think you will have to have that further [fol. 1090] testimony tonight, because under the law you can't separate until you have arrived at a verdict, unless some provision can be made to send you to a hotel for the night. You know the conditions today in New York. If that can be done, why, we will see what can be done about it later; but I think you had better have your testimony read. What testimony do you want read?

The Foreman: The testimony which has been requested to be read is that of Mr. Walsh, which is a very, very long testimony.

The Court: Does the jury desire both the direct and the cross examination?

The Foreman: Yes, sir.

The Court: All his testimony? Not assuming to dictate to the jury, but could that testimony be read, omitting some of the formal, introductory parts, and just get to the conversations?

The Foreman: Yes, sir.

The Court: You want the conversations, conferences at which the defendants were present, I assume?

The Foreman: That is correct.

The Court: And then the cross examination?

The Foreman: That is correct, your Honor.

The Court: And will counsel stipulate that that can be given to them from the typed record, in the manner that they suggested?

Mr. McGeehan: Yes, sir.

Mr. Hogan: Surely.

The Court: All right. Then I suggest that the stenographer read the important portions of that testimony; and if counsel on either side think that any portions are being omitted, which should be read, just call our attention to it; or if the jurors want anything further when they get that.

[fol. 1091] Mr. McGeehan: I suppose that would require all the testimony except the formal part at the beginning.

The Court: They want the testimony as to the meeting at the New York Athletic Club, and the conferences, and the cross-examination; is that correct?

The Foreman: That is correct.

The Court: All right.

Mr. Hogan: Page 554, it has been agreed upon, at the question in the middle of the page. Is that right, Mr. McGeehan?

Mr. McGeehan: I should think so, yes, sir.

The Court: Just a moment, before you start. Mr. Hogan and Mr. McGeehan.

(The Court and counsel conferred.)

The Court: All right.

(The stenographer read to the jury from the question at the middle of page 554 of the transcript of minutes to the first question on page 594.)

The Court: Have you heard enough, Mr. Foreman? Any of the jurors? I don't want to limit you, but I don't think this fight has anything to do with the conversations.

The Foreman: I believe we have heard enough, your Honor.

The Court: All right, you may retire.

Mr. McGeehan: Would your Honor just wait, before they retire?

The Court: Yes. Just wait a while.

(Defense counsel conferred.)

Mr. McGeehan: All right.

The Court: All right; the jury may retire.

(The jury again retired at 1:05 a. m., March 15, 1945.)

[fol. 1092] (After the jury retired, after a conference between the Court and all counsel, in Chambers, the following was placed on the record, in the presence of all counsel:)

MOTION TO READ CROSS-EXAMINATION OF WALSH TO JURY

Mr. McGeehan: May it please the Court, the jury just having come into court and having requested that they be permitted to hear read the testimony of the witness Walsh with respect to the meeting between him and Mac-

Donald and the defendants, in or about August 1938, with a request that the direct and cross examination be read to them upon that subject; and a certain part of the direct testimony having been read to them, and a part of the cross examination which did not relate to the meeting in question having been read; and the jury having retired, I now move the Court that there be read to the jury the portion of the cross examination having to do with such conversation and meeting, particularly including the question on page 618 of the minutes:

"By the Court: Did they use the word 'threat'? Did they use any threats in any language specifically to you?

"Answer: No, sir."

And on page 619:

"By Mr. McGeehan: Question: Did they use any language that you understood to be a threat that if you did not pay this money you would have strikes through them, Mr. Walsh? Answer: Not in language, no."

Next question:

"Question: And not in writing either, did they?

[fol. 1093] "Answer: No."

And on page 617:

"Question: And you were desirous, weren't you, in the event any difficulty did arise, such as with the Sandhogs or anyone else, that you would have the affirmative friendship of national leaders in the labor situation? Weren't you?

"Answer: Well, all we wanted is that they would live up to their agreement.

"Question: Yes, sir; and these two men lived up to their agreement, didn't they?

"Answer: Yes, as far as I know, they did."

I request the Court that that be read, so that the jury will not have emphasized in their minds, through the reading of a portion of the People's testimony on this subject, during their deliberations, without having the reading of this portion of the cross examination which relates thereto.

DENIAL OF MOTION TO READ CROSS-EXAMINATION OF WALSH TO JURY

The Court: Motion denied.

Mr. McGeehan: May I have an exception?

The Court: Surely.

Mr. Hogan: Your Honor, I think that the record should indicate that the jury stated, through its foreman, that it had heard as much as it wanted to hear of the cross examination; that this was stated after the foreman had exchanged glances and some words with other jurors; that the jury started to leave the box, and that counsel requested your Honor to halt the jurors' leaving; that your Honor did so; that counsel conferred, and that then counsel for the defense advised the Court that they had nothing further to ask of the Court; and the jurors were then permitted to leave the courtroom.

[fol. 1094] The Court: I will say this for the record: The Court feels that the jury has already been brought back three times since they retired before noon, and have had read to them such portions of the testimony as they requested. On the first occasion when request was made for certain testimony of the witness Perini, the foreman stopped the reading, stating that he had heard enough, when a considerable portion of the cross examination and the re-direct examination had not been read. After the reading of the direct examination of Mr. Walsh and a portion of the cross examination, and during the reading of that portion of the cross examination which had to do with collateral matters, namely, the sandhogs' strike, the Court asked the jury if they desired to hear any more about that matter, and they indicated that they did not. Several members of the jury then consulted among themselves and with the foreman, and the foreman indicated that they desired no further reading of the testimony.

For that reason, the motion is denied.

(At 2:15 a. m. the Court received the following communication in writing from the jury:

"May we render a decision on five counts if we cannot agree on the sixth?")

(In chambers, with the Court and all counsel present, the following was placed on the record:)

The Court: I just received a note from the jury, and they say, "May we render a decision on five counts if we cannot agree on the sixth?"

Now, have any of you any suggestions? I thought that if there is no objection I would send word to the jury that [fol. 1095] we would prefer to have a decision on all counts, but if they feel at this time that it is hopeless and that there is no possible chance of an agreement within a reasonable length of time, that they may report on the five counts they have agreed on. Or leave them alone—whatever you say—or I will have them brought down and ask them.

Mr. Fitzsimmons: I think, whatever we make up our minds to do, you can send word up, without bringing them down. I don't know—I think that is just thinking out loud.

The Court: Is there any objection if I send word to them, just briefly asking them if they feel that an agreement on the sixth count is hopeless?

Mr. Hogan: No objection by the People. That is, you would say, I understand, Judge, that an agreement one way or the other is desirable, but if they feel at this time, after——

The Court: Well, I wasn't even going to tell them that; I was merely going to, in answer to their request, ask them if they feel that an agreement on the sixth count that they mention is hopeless within a reasonable time, or if they feel that if they consider it a little longer they can agree; and I will indicate what is going to happen.

Mr. Hogan: Yes.

The Court: What do you say, Mr. Polakoff?

Mr. Polakoff: I can't see anything wrong in that.

The Court: Well, is there objection to that? Do you object to it?

Mr. Polakoff: No.

Mr. McGeehan: May I speak to Mr. Polakoff?

The Court: Certainly.

(Defense counsel confer.)

[fol. 1096] Mr. McGeehan: Whatever you think ought to be done. It is nice to consult us about it.

The Court: Ordinarily, I would call them down and I would ask them, after receiving a message like this, if they feel that they can agree within a reasonable time, or if they feel they have reached a deadlock in their deliberations.

If there were only one count, I would send for them. They don't say they have agreed, they say, "May we render a decision on five counts if we cannot agree on the sixth?" Now, they don't say they have agreed on five counts. I assume from that language that they have agreed. I will put right on the note, "Do you believe it possible to reach an agreement on the sixth count within a reasonable time or do you feel that it is impossible to agree on that count? If so, you may report on the counts that you have agreed on."

Is there any objection?

Mr. Hogan: No.

The Court: Is there any objection on your part?

Mr. McGeehan: No.

INSTRUCTIONS TO JURY

(The Court thereupon wrote the following notation upon the jurors' communication:

"The Court advises that if you feel it is impossible to agree upon a verdict on any count, you may report on such counts as you have agreed upon.")

The Court (reading): "The Court advises that if you feel it is impossible to agree upon a verdict on any count, you may report on such counts as you have agreed upon." Is there any objection to it in that form?

Mr. Hogan: No.

[fol. 1097] Mr. McGeehan: No.

(At 2:25 o'clock a. m., the Court returned the written communication to the jury, with the foregoing notation by the Court.)

(At 2:30 o'clock a. m., the Court received the following communication in writing from the jury:

"We find it impossible to agree on one count and are ready to report on the other five.")

(At 2:35 o'clock a. m. the jury returned to the courtroom and resumed their seats in the jury box. Both defendants and all counsel present. The Clerk called the roll of the jurors, all answering present.)

VERDICT

The Clerk: Will the foreman please rise? Members of the jury, have you agreed upon a verdict?

The Foreman: Yes, Sir.

The Clerk: How do you find?

The Foreman: I must give it by counts?

The Clerk: Render your verdict——

The Foreman: On the first count the verdict is guilty.

On the second count not guilty.

On the third count not guilty.

On the fourth count, by direction of the Court, not guilty.

On the fifth count, not guilty.

On the sixth count no decision.

On the seventh count guilty.

The Clerk: Members of the jury, hearken to your verdict as it stands recorded:

You say, through your foreman, you have rendered the following verdict:

On the first count of this indictment guilty.

[fol. 1098] On the second count not guilty.

On the third count not guilty.

On the fourth count, by direction of the Court, not guilty.

On the fifth count not guilty.

On the sixth count you have disagreed.

And on the seventh count guilty.

And so say you all.

The Foreman: We do.

The Court: Members of the jury, you are discharged from further service at this——

POLLING OF JURY

Mr. Fitzsimmons: Judge, may we have the jury polled?

The Court: Yes, certainly. Poll the jury.

Mr. Fitzsimmons: On each count?

The Court: On each count.

Mr. Fitzsimmons: On each count where they have rendered a verdict of guilty.

The Court: You do not care to have them polled on the other counts?

Mr. Fitzsimmons: No.

The Court: First poll them on the first count.

The Clerk: Members of the jury, as I ask you this question, each one of you will rise as your name is called and answer the question yes or no.

(The Clerk thereupon polled the jury, and in answer to the question, "What is your verdict on the first count of

the indictment?" Each and every juror answered "Guilty.")

The Court: Poll on the seventh count.

(The Clerk thereupon polled the jury, and in answer to the question, "What is your verdict on the seventh count of this indictment?" Each and every juror answer—"Guilty.")

[fol. 1099] The Clerk: Members of the jury, hearken to your verdict as it stands polled: You say you have found the defendants at the Bar guilty on the first count of this indictment and guilty on the seventh count, and so say you all.

The Foreman: We do.

The Court: And not guilty on the other counts. All right, members of the jury, you are excused, with the thanks of the Court and the People for your services at this term of court, and you may now retire.

Are there any motions?

Mr. Fitzsimmons: May we reserve our right to make all motions on the day of sentence?

The Court: All right. Take the defendants' record.

(After each defendant was duly sworn by the Court, the clerk took the record of each defendant.)

(Court and counsel conferred at the bench.)

The Court: The defendants are remanded. Recess until the 5th day of April, at ten o'clock.

[fol. 1100] Room 1530, Criminal Courts Building,
Thursday, April 5, 1945.

Appearances:

Mr. Hogan, Mr. Gelb, Mr. Sarafite, Mr. O'Connor, for The People.

Mr. Fitzsimmons and Mr. McGeehan, for the defendant Fay.

Mr. Polakoff, for the defendant Bove.

The Clerk of the Court: Case of the People against Joseph S. Fay and James Bove.

The Court: Any motions?

MOTION BY DEFENDANT FAY TO SET ASIDE VERDICT OF GUILTY ON COUNTS 1 AND 7

Mr. McGeehan: Yes, sir. May it please the Court, I move at this time on behalf of the defendant Joseph S. Fay that the verdict of the jury of Guilty upon the First and Seventh Counts of the Indictment be set aside as contrary to law, contrary to fact, and clearly against the evidence, and upon the further grounds that the Court misdirected the jury in matters of law, and that the verdict was decided by means other than a fair expression of opinion on the part of all the jurors—all to the substantial prejudice of the defendant.

The supporting grounds for this application are as follows: First, the elements of proof necessary to constitute the crime of extortion are set forth in Sections 850 and 851 of the Penal Law. Those statutes read as follows:

> Section 850: Extortion is the obtaining of a property from another, or the obtaining of the property of a [fol. 1101] corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right.
>
> Section 851: Fear, such as will constitute extortion, may be induced by an oral or written threat:
>
> 1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family, or to a corporation of which he shall be an officer, stockholder, employee or agent——

The rest of that section not being pertinent.

The Legislature has therefore specifically defined the offense of Extortion, and the burden is therefore upon the People to prove each and every essential element of the crime of Extortion as defined in the statute. The defendants, Joseph S. Fay and James Bove, were convicted of extortion on Count 7 of the indictment. They have failed to establish that the money that was obtained by the defendants, of the Walsh Company, from an officer, agent or employee thereof, was obtained with the consent which was induced by a wrongful use of force or fear induced by any oral or written threat to do an unlawful injury to the person or property of the individual or individuals allegedly

threatened, or to the corporation of which they were an officer, stockholder, employee or agent, or to the said Walsh Company; and failed to prove the specific allegations of the 7th count, and failed to prove the conspiracy as alleged in Count 1.

[fol. 1102] The attention of the Court is specifically directed to the complete absence in the testimony of any threats by either of the defendants, oral or written, to do any unlawful injury to such person or property; to the complete absence of any testimony of any threat, oral or written, to do or cause to be done any injury whatever in the event money was not paid; to the complete absence of any testimony that any fear of the Walsh Construction Company or its officers was induced or engendered by anything said or done by the defendants, or either of them; to the absence of any evidence that they produced any fear caused or engendered by any threat by defendants that anything injurious would be done by the defendants, or caused to be done by the defendants, if the money in question were not paid.

The attention of the Court is specifically directed to the affirmative testimony of the witness Thomas Joseph Walsh, Page 618, in answer to the Court's question, that the defendants did not use any threats in any language specifically to Walsh; and Page 619, that the defendants did not use any language, that Walsh understood to be a threat that, if he did not pay this money, he would have strikes through the defendants, either in language or in writing. And to the testimony, Page 563, wherein on direct examination Walsh said, "I'll say I was fearful that if we didn't do this, there might be something that arose during the life of the job that would very much, very materially interfere with the progress of the job, and would cost us a lot of money." But immediately thereafter he said, "No, nothing was mentioned by Mr. Fay or Bove. I had in mind——" [fol. 1103] That was not completed. On Page 564 he stated that he had in mind the possibility of labor trouble, and so forth. His testimony is bereft of any proof that such fears or possibilities that he had in mind were caused by any threats made by the defendants, or that even those fears or possibilities had to do with labor difficulties that might be engendered by the defendants themselves or through

them. He may well have meant strikes by others which they could prevent for him.

It is equally consistent with the affirmative testimony that he and MacDonald gave, that they were desirous of affirmative assistance from Fay and Bove, which they both testified they did receive in pursuance of their acknowledged desire not to have to do business with the Sandhogs Union, and to contest the picketing by the sandhogs when it occurred. Even the foregoing testimony was given concerning the Associated Contractors payment under Count 6, upon which there was a disagreement by the jury, and there was utterly no testimony on the subject of threats or fear by Walsh with reference to Count 7, except that he said, Page 574, when asked whether he was in fear when the Walsh Company payment was agreed to: "We did it for the same reason we had agreed to pay on the Associated."

We wish to point out that the witness MacDonald, also an officer of the Walsh Company, did not testify that any threats were made or that he possessed any fear, but merely that while he could not remember exactly what was said, in substance Fay or Bove—he had forgotten which one—said that "the job would go along very smooth if we could [fol. 1104] go along with them on the proposition." Page 669. And when asked whether anything was said about labor trouble, testified, "Well, it was said that if we did go along, why we were sure not to have any labor trouble." He did not say whether the labor trouble referred to was labor trouble arising out of the sandhog situation, which union he admitted they had trouble with on a prior job, and which later struck on the East River job against the Walsh Company and picketed the Aqueduct job—which picketing was fought by Fay and Bove to the benefit of the Walsh Company as well as their own union members. He did not say he interpreted this to mean that if he didn't pay, they would have trouble. Even this testimony was given as to the payment under the sixth count, and no testimony whatever was given by this witness as to any fear or threats in connection with the payment on the seventh count.

All he did say, Page 683, was that they said, "If we paid this, the job would run smoothly and we would not have any labor trouble."

As to the witness Small, he testified, Page 739, concerning the Walsh Company payment, that the defendant Fay said, "Well, I think it would be to your advantage to go along with us, that if you do, the job will run along better, there will be no trouble on the job." He was not asked whether he had any fear of any unlawful injury to be perpetrated by these defendants or any threats thereof which produced any fear, and testified to nothing that could be construed as such a threat, as defined in the statute.

It is also pointed out that the testimony of these three witnesses, Walsh, McDonald and Small, as to the money [fol. 1105] paid under the seventh count, was consistent with the theory that it was paid voluntarily and that the consent to the payment thereof was not induced by fear resulting from threats, but by the desire of the Walsh Company to have the affirmative assistance of these defendants in the vast project which the Walsh Company was embarking upon, which is summarized by the testimony of Walsh, Page 617, that in the original conversations with Fay and Bove, he was conscious of the vast job he was embarking upon; he had determined not to do business with the Sandhogs Union. He testified, Page 617:

"Q. And you were desirous, weren't you, in the event any difficulty did arise such as with the sandhogs or anyone else, that you would have the affirmative friendship of national leaders in the labor situation? Weren't you?

A. Well, all we wanted is that they would live up to their agreement."

"Q. Yes, sir. And these two men lived up to their agreement, did they not?

A. Yes, as far as I know, they did."

It was immediately after this that he testified that no threats were made. There may be pointed out at this time the anomaly that the jury convicted on the seventh count while disagreeing on the sixth count, although the evidence under the seventh count was even more lacking of any attempted proof of threats or fear than was the sixth count—an inconsistency which is hard to explain except upon the theory of a tired, wornout jury when, at close to three o'clock in the morning, after approximately 14 or [fol. 1106] 15 hours' deliberation, they finally agreed on the last count, after having come before the Court at 12:30 o'clock to have testimony read concerning this count.

It is therefore respectfully contended that the verdict of guilty on the seventh count was contrary to law, contrary to the facts, and clearly against the evidence.

It is also submitted that the verdict of Guilty on the first count was contrary to law, contrary to fact, and clearly against the evidence, because the conspiracy therein charged was a conspiracy to commit the crime of extortion, and there was no evidence in the entire case that the defendants conspired to commit such crime, as defined in the statute above quoted; and it is respectfully contended and moved that the verdict of Guilty on the first count should likewise be set aside upon the above grounds.

Next, the verdict of the jury should be set aside because of errors of law which worked to the substantial prejudice of the defendant Fay, in the allowance by the Court of protracted, improper cross examination by the District Attorney of the character witnesses produced by the defendant Fay. The questions asked by the District Attorney over defendants' objections were highly inflammatory and prejudical; they were irrelevant to the character trait in issue, and it was apparent that the purpose of such questions was clearly to insinuate to the jury matters calculated to prejudice the jury against this defendant, which could not be properly proven, and by constant repetition to impress upon the jury the probability of the existence of the assumed facts upon which the District Attorney's questions were based.

[fol. 1107] The Court charged the jury on the law with respect to character testimony briefly. The Court erred in failing to point out to the jury that the extraneous facts set forth in the District Attorney's questions on cross examination of character witnesses, which were mainly alleged acts of specific misconduct by the defendant Fay, were not evidence in the case. Even if the witnesses had heard of the acts of misconduct, such acts could not be considered by the jury as evidence against the defendant Fay, except in so far as the witnesses' answers might aid the jury in determining whether to accept or disregard the testimony of the particular witness on the stand as to the defendant Fay's reputation for honesty and fair dealing.

In dealing with such highly inflammatory testimony permitted over objections, the Court, it is submitted, was obliged to carefully explain to the jury its purpose, and

the limitations to which its use is subjected, which the Court failed to do.

Next, the verdict of the jury should be set aside because of the Court's error of law in permitting the witness Perini on re-direct examination to testify to an alleged payment to defendants Fay and Bove in connection with the Lincoln Tunnel job. There was no count in the indictment covering this transaction. It was admitted by the Court on the theory that counsel for the defendant Bove had opened the door by questioning the witness Perini about some aspects of the Lincoln Tunnel job on his cross examination. A reading of the record will establish that such [fol. 1108] cross examination did not open the door or justify the admission of the testimony. Furthermore and in any event, the defendant Fay should not be prejudiced by the introduction of such testimony since his counsel did not open the door and clearly so informed the Court in objecting to the testimony. The Court however allowed evidence of the transaction on re-direct examination as against both defendants, and failed to admonish the jury that it was not to be considered as against the defendant Fay.

Despite the acquittal of the defendants on the extortion count involving B. Perini & Sons, Inc., this testimony became highly prejudiced to the defendant Fay, and the verdict should be set aside because the Court erroneously charged the jury that evidence of payment of moneys by B. Perini & Sons, Inc. on the Lincoln Tunnel Job could be considered by the jury against this defendant, not only in connection with the extortion count involving B. Perini & Sons, Inc., but also in connection with the conspiracy count of the indictment upon which the jury subsequently convicted the defendant.

Next, the verdict of the jury should be set aside because of the errors of law which worked to the substantial prejudice of the defendant Fay, in the sustaining by the Court of objections made by the District Attorney to questions on cross examination of the various witnesses for the People by counsel for defendant Fay. These questions specifically asked whether or not the witnesses had ever been threatened by either of the defendants that an unlawful injury would be done to their property if money were not paid to the defendants.

[fol. 1109] The Court further erred in stating, in support of its ruling on these questions, that it was not for the witnesses to say whether they were threatened, but rather for the jury to determine as a fact from the conversations.

Next, the Court misdirected the jury in its Charge wherein it stated, in defining the crime of extortion and giving the elements which must be proved beyond a reasonable doubt as follows, in part:

"3. The consent must have been induced by force or fear. If induced by fear, the fear must have been induced by the use of threats, either oral or written, express or implied, direct or indirect, made by one of the defendants——"

It is respectfully urged that this definition and charge was erroneous in that it does not comply with the statutory definition, and instructed the jury that it could convict upon proof of threats which were not either oral or written, and which could be implied.

The Court further erred and misdirected the jury in stating, as part of its charge:

"The statute requires proof of threats of an unlawful injury. Threats to do an innocent or lawful act may become unlawful if made with an unlawful motive, for an unlawful purpose. Strikes by labor unions, and picketing are lawful and proper in themselves when used for lawful and legitimate purposes, and when carried out according to law. They may be lawful when used for legitimate purposes, even though they are used unreasonably, arbitrarily and harshly.

"Any threats, however, express or implied, direct or [fol. 1110] indirect, to call a strike or to place a picket line, or to prevent by union action a person from lawfully carrying out his business, if such threat is made with the intent to induce fear, and to cause the victim as the result to pay money—in other words, to extort—would be an unlawful threat to do an unlawful injury. In other words, the same threats which are lawful when made to enforce the lawful demands of a union, even though those demands may be considered unreasonable and arbitrary, may become unlawful threats when made or used for the unlawful purpose of compelling the person to whom the threat is made, to part with his money.

"The form of the threat is immaterial Any language or acts, or any combination of language and acts which convey

a threat that an injury will occur to the person or property of the victim, or to his corporation, unless money is forthcoming, would be sufficient. The threat may be read from all the surrounding circumstances. The word 'property' includes a man's business, and any interference with or loss of business is an injury to property. Unlawful picketing, unlawful strikes, or unlawful interference with the work of a construction contract may result in such injury, because those things are calculated to and do cause a loss of income and business. The amount of the loss threatened or the extent of the injury threatened is immaterial."

It is respectfully urged that by the foregoing the Court in effect charged the jury that they could convict if there was a threat to do an innocent or lawful act, which is contrary to the statute under which the threat must be to do an [fol. 1111] unlawful injury. The statement that "the threat may be read from all the surrounding circumstances" would permit the jury to convict even though no threat, verbal or written, was ever made or intended by the defendant, but would make it sufficient for the payer of the money to read a threat, from your instructions "of all the surrounding circumstances." Furthermore, this portion of the charge was not predicated upon any evidence whatever to factually support the same.

Next, the verdicts of the jury should be set aside as contrary to law on the ground that the entire special jury list from which the special panel in the instant case was drawn, and from which the trial jury was ultimately selected, was unconstitutionally drawn. The Court erred in overruling the challenge to the panel made on behalf of the defendants in the instant case. The evidence taken on the challenge to the panel established that the constitutional rights of the defendants under Article 1, Sections 1 and 2 of the Constitution of the State of New York and under the 14th Amendment of the United States Constitution has been violated. It further established that Section 749-AA of the Judiciary Law of the State of New York was unconstitutional, both on its face and as applied to the instant case.

Next, the said verdict of the jury should be set aside because it was decided by means other than a fair expression of opinion on the part of the jurors, in that the verdict was returned after excessive confinement of the jury for a period of approximately fourteen hours, and approxi-

mately two hours after the jury had, at 12:30 o'clock in the [fol. 1112] morning, stated to the Court that they had reached a decision on all counts but one; "it appears to us that in the deliberations we do need some additional testimony. Some of the jurors have expressed the fact that they are rather tired—and would prefer hearing the testimony in the morning; but it seems that we do need additional testimony."

In answer thereto the Court stated: "I think you will have that further testimony tonight, because under the law you can't separate until you have arrived at a verdict, unless some provision can be made to send you to a hotel for the night. You know the conditions today in New York. If that can be done, why, we will see what can be done about it later; but I think you had better have your testimony read. What testimony do you want read?

"The Foreman: The testimony which has been requested to be read is that of Mr. Walsh, which is a very, very long testimony."

It is obvious from the above that the jury, which included one elderly lady, was mentally and physically tired after its long deliberations on the large number of counts in the indictment, and had reached the last count; and it is inferrable from the Court's language that the jury understood they would be kept in session until they agreed upon a verdict, and that they might have to continue their deliberations throughout the night.

The instruction also constituted error for which the verdict should be set aside. It is significant that, having apparently agreed to acquit on all the other extortion counts and disagreed on one, that they convicted upon that [fol. 1113] last count when they had reached a state of mental and physical exhaustion, and under these circumstances their verdict could not have been decided by means of a fair expression of opinion on the part of all the jurors.

Under these circumstances, and in view of the request of the jury to have the testimony of the witness Walsh read, the next ground of application assumes added significance. Next: The Court erred in refusing to recall the jury when requested, by reading to them the following quoted excerpts from the cross examination of the witness Walsh as requested by counsel for the defendant Fay. This request was made immediately after the jury retired, after having

had read to them at their request a portion of the witness Walsh's testimony. On Page 1303:

"Mr. McGeehan: May it please the Court, the jury having just come into court and having requested that they be permitted to hear read the testimony of the witness Walsh with respect to the meeting between him and Mr. MacDonald and the defendants, in or about August 1938, with a request that the direct and cross examination be read to them upon that subject; and a certain part of the direct testimony having been read to them, and a part of the cross examination which did not relate to the meeting in question having been read; and the jury having retired; I now move the Court that there be read to the jury the portion of the cross examination having to do with such conversation and meeting, particularly including the question on Page 618 of the minutes;

"By the Court: Did they use the word 'threat'? Did [fol. 1114] they use any threats in any language specifically to you?

"Answer: No, sir."

"And on Page 619:

"By Mr. McGeehan: Question: Did they use any language that you understood to be a threat that if you did not pay this money you would have strikes through them, Mr. Walsh? Answer: Not in language, no."

"Next Question:

"Question: And not in writing either, did they?

"Answer: No."

"And on Page 617:

"Question: And you were desirous, weren't you, in the event any difficulty did arise, such as with the Sandhogs or any one else, that you would have the affirmative friendship of national leaders in the labor situation? Weren't you?

"Answer: Well, all we wanted is that they would live up to their agreement.

"Question: Yes, sir; and these two men lived up to their agreement, didn't they?

"Answer: Yes, as far as I know, they did."

"I request the Court that that be read, so that the jury will not have emphasized in their minds, through the read-

ing of a portion of the People's testimony on this subject, during their deliberations, without having the reading of this portion of the cross examination which relates thereto.

"The Court: Motion denied.

"Mr. McGeehan: May I have an exception?

"The Court: Surely."

[fol. 1115] It is respectfully submitted that inasmuch as these specific questions and answers on cross examination had to do with the very subject matter with reference to which the jury had requested to have the testimony of the witness Walsh read, it was important and essential that this be given to them, together with what was read; and the failure to do so was prejudicial to the substantial rights of the defendant. It is significant that the conviction of extortion was upon the last count which they were then considering.

For all of the above reasons, it is respectfully urged that the substantial rights of the defendants have been prejudiced, and that the verdicts of Guilty on the first and seventh counts should be set aside, and a new trial granted thereon.

MOTION BY DEFENDANT FAY FOR ARREST OF JUDGMENT

I also move at this time an arrest of judgment on the following grounds: First, the indictment failed to state on its face facts sufficient to constitute a crime. It did not allege with any degree of particularity the dates on which the defendants were alleged to have obtained money from the construction companies mentioned. The indictment with respect to each of the substantive counts of extortion alleged the obtaining of money from construction companies over periods varying in length from two to six years. This indefiniteness in the allegations of the indictment was not cured before the trial, because the Court denied the defendants' motion for a bill of particulars.

Secondly, the Court lacks jurisdiction to impose sentences upon the defendants, because the jury was selected from a [fol. 1116-1145] special panel that was unconstitutionally drawn, for the reasons set forth in the written challenge filed by the defendants to the panel. Therefore, the trial jury which was selected from this unlawfully drawn special panel was in turn illegal, and the constitutional rights of the defendants under the State and Federal constitutions were violated. The defendants not having been convicted

by a properly drawn jury cannot be sentenced legally by this Court and judgment cannot be properly pronounced by the Court.

I therefore move an arrest of the judgment upon those grounds.

DENIAL OF MOTIONS BY DEFENDANTS TO SET ASIDE VERDICT OF GUILTY ON COUNTS 1 AND 7 AND FOR ARREST OF JUDGMENT

The Court: Both denied.

Mr. Polakoff: May the same motions and same rulings apply to the defendant Bove, your Honor?

The Court: Denied.

(Here follow 2 Photolithographs, side folios 1146-1147)

DEFENDANTS' EXHIBIT D-1—JURORS' QUESTIONNAIRE

QUALIFICATIONS TO SERVE AS JUROR

STATE OF NEW YORK, COUNTY OF NEW YORK, ss:

DO NOT WRITE IN THIS BOX — DATE — JURY — BY WHOM EXAMINED

The undersigned being duly sworn, makes the following answers [EXPLANATIONS OR REMARKS CONCERNING QUESTIONS MAY BE MADE IN SPACES UNDER OR OPPOSITE THEM]:

1 Print name in full _____ (FIRST NAME — MIDDLE NAME — LAST NAME) Married___ Single___ Widower___ No. of Children___ Divorced___ Seperated___

2 Date of birth (MO. — DAY — YEAR) ___ Color ___ Color hair ___ Color eyes ___ Wear glasses ___ Distinguishing physical characteristics ___ Weight ___ Height ___

3 Residence ___ N. Y. SUPREME COURT P. O. Key No. ___ Apt. No. ___ Tel. No. ___

4 Are you the tenant ___ If not, with whom do you live? ___ EX. How long living at present address ___ How long in N. Y. State ___ In N. Y. ___

5 Former residences for past six years ___ FEB 27 1945 ANNA POLLMANN Official Reporter

6 Give any other name you have used or been known by ___ Did you register at last election ___ Where did you live then ___

7 Place of Birth ___ (CITY — STATE) If not American born, how became citizen ___ When naturalized ___ Where ___

8 Education: Primary, High School, College, degrees, special studies, etc ___

9 Occupation ___ Employed at present ___ Business address ___ P. O. Key No. ___ Tel. No. ___

10 Firm name of employer ___ How long in present employment ___

11 What other employment during past six years ___

12 Wife's name ___ Her occupation ___ Her firm ___ Her business address ___

13 Do you or your wife own property (such as bank account, furniture, insurance, trust funds, stocks, bonds, mortgages, land, etc.) worth $250 ___ Describe property ___

14 Are you employed on a Federal, State or City Public Works Project ___ Are you on relief ___ Ever served as a juror ___ In what court and when did you last serve ___

15 Ever been denied listing as a qualified juror or been stricken from any list of jurors ___ Where and why ___

16 Are you physically disabled or incapacitated ___ Is your hearing or eyesight so impaired that you could not intelligently follow a case in court ___ Ever confined to a State or Private Institution ___

17 If your answer to any question on line 16 is "Yes", give all particulars ___

18 Ever arrested or indicted on a criminal charge ___ Ever convicted ___ Have you ever had any trouble with the authorities? This includes a violation of a traffic ordinance, or statute or any other ordinance ___ Any judgment ever entered against you in a civil court on allegations of fraud or misconduct ___

19 Any judgments outstanding against you ___ Nature of actions in which obtained ___

20 Have you ever been in bankruptcy or made a general assignment for the benefit of creditors ___ X Have you such views concerning the death penalty as would prevent you from finding a defendant guilty if the crime charged be punishable by death ___

21 Have you such opinions as would prevent a verdict of guilty in a criminal case upon circumstantial evidence ___ X Do you doubt your ability to lay aside opinions or impressions, the result of newspaper reading or hearsay, and render an impartial verdict upon the evidence ___

22 Are you aware of any prejudice against any state law which would prevent a finding of guilt for violating such law ___ Have you such a prejudice against any particular defense to a criminal charge as would prevent your finding a fair and impartial verdict upon its merits ___

23 By law the failure of a defendant in a criminal case to testify is not considered as any evidence of his guilt. Would you give a defendant the benefit of this law ___ X What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months) ___

24 Is there anything which would influence you as a juror, as affecting any person, or class of persons because of nationality, age, color, race, religion, wealth, occupation, political affiliation, social or economic belief or any other reason ___

SWORN TO BEFORE ME THIS ___ DAY OF ___, 19___ THE FOREGOING ANSWERS ARE TRUE IN ALL RESPECTS

___ (SIGN NAME)

(DO NOT WRITE BELOW THIS LINE)

___ (NAME — RESIDENCE — OCCUPATION — BUSINESS ADDRESS — DATE OF BIRTH)

State of New York,
County of New York, ss.:

Explanation of any answers on opposite side of this form, or remarks, may be made here

_____ being duly sworn, deposes and says:
I do not dwell or lodge nor do I have or maintain a dwelling or lodging in the County of New York for the greater part of the time between the first day of October and the thirtieth day of June next thereafter, and I am not a resident of said County but I reside permanently at _____

City of _____ County of _____ State of _____ and have resided there since _____

Sworn to before me, this _____

day of _____ 194__

_____
Deputy County Clerk

State of New York,
County of New York, ss.:

_____ being duly sworn deposes and says:
I am entitled to and claim exemption } from doing jury service for the following
I am disqualified }
reason _____

Sworn to before me, this _____

day of _____ 194__

_____
Deputy County Clerk

NAME _____ ADDRESS _____ BIRTH DATE _____ INDEX NO. _____

RECORD OF JURY SERVICE

DATE PLACED IN WHEEL	TERM DRAWN	COURT	DAYS IN ATTENDANCE	DAYS ACTUALLY SERVED	IF EXCUSED REASON	DATE PLACED IN WHEEL	TERM DRAWN	COURT	DAYS IN ATTENDANCE	DAYS ACTUALLY SERVED	IF EXCUSED REASON

BUSINESS ADDRESS _____ CHANGES OF ADDRESS _____

RESIDENCE _____

[fol. 1148] DEFENDANTS' EXHIBIT D-2

* * * Survey by W H M and J J M on January 31, 1945 * * *

Total number of special jurors on file in New York County Clerk's Office	2,911
Total number with classifiable occupations	2,743
Auditors and accountants	166
Bankers	170
Manufacturers	106
Real Estate Brokers	117
Retired	62
Architects and engineers	229
Educators, teachers, librarians	27
Executives, managers of industrial enterprises	470
Stock brokers	185
Salesmen, promotors of business enterprises and advertising men	438
Newspaper men, editorial writers and others engaged in the dissemination of information	148
Mechanics	5
Insurance men	166
Travel agency men	10
Civil service employees	21
Office clerks	94
Retail merchants	144
Entertainers	26
Building and construction superintendents	70
Chemists and physicists	66
Attorneys	5
Laborers	None
Labor union representatives	1
Housewives	20

—There are only about 30 women on the entire special jury list—

N. Y. SUPREME COURT
FEB 26 1945

DAILY NEWS, MONDAY, FEBRUARY 26, 1945

Extortion Trail of Fay, Bove, Indicted 2 Years, Starts Today

By JOHN CROSSON

After months of sparring, the main bout was due at last to go on at 10 A. M. today in General Sessions. In one corner will be District Attorney Frank S. Hogan and his assistant Sol Gelb, representing the State; in the other Joseph S. (Joe) Fay and his pal, James (Jim) Bove, illustrious representatives of the AFL.

The referee, named by the Appellate Division, is Supreme Court Justice William A. Munson of Orleans County.

It will be his job, with the help of a blue ribbon jury, to determine the course of the battle, in which Joe and Jim are charged with extorting $420,000 from nine syndicates engaged in recent construction of the city's $300,000,000 Delaware water supply project.

Indicted in May, 1943.

The first punches were thrown back in May, 1943, when the millionaire Fay, international vice president of the Union of Operating Engineers, and the debonair Bove, international vice president of the Hod Carriers, Builders and Common Laborers, were indicted for extortion and held in $25,000 bail each.

Both countered with indignant pleas of not guilty, and Fay's attorney, Robert J. Fitzsimmons, followed through with the thrust that D. A. Hogan was making a "Roman holiday" out of the case.

While Fitzsimmons didn't elaborate, his rally was regarded as an answer to Hogan's charge that Fay had tried to silence several witnesses with threats.

Fay Quoted on It.

Fay, a political power in his native Newark, was quoted as saying:

"They won't testify at the trial. I'll take care of that."

And so for nearly two years, back and forth, with the contestants finally squaring off today

Just Friendly Interest, Says Wally

Lieut. Comdr. Wallace Beery and Sylvia Galfield as they arrived in Los Angeles.

LOS ANGELES—Arriving from Chicago on the Santa Fe Chief, Lieut. Comdr. Wallace Beery, USNR, veteran movie actor, and 17-year-old Sylvia Galfield still deny any plans to wed. They are just friends, Wally says. Sylvia plans to enter University of California here.

CAPITOL STUFF

By JOHN O'DONNELL

Washington, D. C., Feb. 25.—If you stay in New Deal Washington long enough, you absorb a lot of information about the human race.

It was only today that we discovered that it was tough old William the Conqueror (1028-1087) who thought up the idea of the curfew which Franklin Delano Roosevelt (1882-?) and Director of War Mobilization James Francis Byrnes (1879-?) have decreed shall be enforced on the citizens of the republic beginning at midnight tomorrow.

William didn't speak English very well when his forces from Normandy crossed the Channel, established a beachhead at Pevensey (Sept. 28, 1066) and a fortnight later—Oct. 14, to be exact—got out of their foxholes and liberated the Britons by smashing the aggressors and Fascists under Harold, who was just a dirty so-and-so under international law and didn't respect an oath even when he swore it over the most sanctified bones that the local supreme court could produce.

How This Curfew Business Got Its Name.

What the Norman liberator found himself faced with was the fact that crowds of British and Welsh collaborators used to get together of nights, huddle over a fire and cook up nasty schemes. Most of the schemes had to do with putting the sing on this big shot liberator from overseas, who couldn't even speak their language, had never seen their country before, but was damned certain that the only way to make Christendom one big, happy family was to knock the brains out of those who objected to his liberation policy and above all—"stop those damned fires where the boys are cooking up subversive propaganda."

Now the only word that William knew for fire was his native French "feu." And the only word he knew for covering fires—damping them (an idea he sold to the natives as a fuel conservation program) was the old French "couvrir," to cover. Hence couvre-feu—hence curfew.

We note that back more than 200 years ago, British writer Shenstone was recalling to his compatriots:

"No more!, I weep, each Briton's breast of old
"When the dull curfew spoke their freedom fled."

* * *

Washington is like this: On Washington's Birthday, by way of giving the young ladies of the capital's outstanding preparatory schools a first-hand lesson on how their nation is being run, they are traditionally escorted by their professors and instructors in civics (the science of government with particular application to the United States of America) to Congress. They sit in previously reserved seats in the gallery and pay respectful attention to the worthy lawmakers, en masse in action. Over the weekend, after meditating on their adventures, they write a theme for submission to their instructors in English composition and government describing the intellectual fruits of their visit to Capitol Hill.

What the Young Ladies Heard on Their Visit.

Unfortunately, we have been unable to obtain any of the young ladies' reports of their annual Washington Birthday visit to Congress. But this we do know:

In the House they heard the chaplain, the Rev. James Shera Montgomery, D.D., pay his respects to the Father of His Country with the invocation:

"Almighty God, today we honor him whose dust sleeps on the banks of yonder river. . . . Keep us true to our trust and responsibility

Joseph S. Fay

James Boro

Face 93 years' jail if convicted.

as the court starts drawing its jury from a panel of 300.

It should be a lively parade, with a decision likely in six or seven weeks. If Joe and Jim lose on all counts on three seven they could expect as much as 93 years in all.

Few Strikes in State

Only five strikes involving 295 workers were before the State Mediation Board in January, Arthur S. Meyer, chairman, reported yesterday.

Captives Tote Tired GI

With the U. S. 9th Army in Germany, Feb. 25 (AP)—Infantry, fighting in threadbare, but Lieut. Col. George Robinson of Austin, Tex., related today how at least one doughboy solved the problem of getting some rest.

"I saw about 100 prisoners coming down the road," Robinson said. "Four were carrying a stretcher on which a GI sat crosslegged like a sultan, with a bemaygun on his lap. He was in complete command of the situation.

"He would yell at the Germans and they would break into a trot.

"I asked him if he was hurt and he replied:

"'No, colonel, I am just so tired I feel like I couldn't walk another step, so I thought that as long as I had to take those prisoners back they might as well furnish the transportation.'"

(By wire)

Lieut. Comdr. Wallace Beery and Sylvia Galfield as they arrived in Los Angeles.

LOS ANGELES—Arriving from Chicago on the Santa Fe Chief, Lieut. Comdr. Wallace Beery, USNR, veteran movie actor, and 17-year-old Sylvia Galfield still deny any plans to wed. They are just friends. Wally says Sylvia plans to enter University of California here.

75,000 Facing Draft Here in 30-33 Class

Approximately 75,000 New Yorkers in the 30-33 age group face induction under the stepped-up order limiting deferment to "necessary"—men in essential industry, Col. Arthur V. McDermott, City Selective Service Director, said yesterday.

Actual drafting will begin about Thursday, he said, when the order for the increased induction will reach local boards.

The order, which was issued Saturday in Washington, permits deferment only of a man is "necessary to and regularly engaged in an activity in war production or in support of the national health, safety or interest."

Previously it was only necessary to be "engaged in" such an industry for a deferment. This latter rule still stands for men 34-37.

McDermott said there are 180,000 men in the 30-37 group who have 2A and 2B classifications. Although he did not have exact breakdown figures he approximated the 75,000 by taking three-eighths of the overall total.

He said he will issue orders tomorrow to local boards and have the complete breakdown before the end of the week.

Taft Queries Army On 18-Year-Olds

Washington, D. C., Feb. 25 (AP)—Senator Taft (R-Ohio) demanded today that the War Department clarify and state its policy on induction of 18-year old draftees with less than a year's training on overseas combat.

The Ohio Senator told a reporter he will rise in the Senate tomorrow in the case of Pfc Robert R. Pogue of Cincinnati, 18, who was reported killed in action in France Feb. 3 a little more than seven months after his induction.

Shipped Over in January.

Taft, who knows young Pogue intimately, said he was informed that the youth received 17 weeks of training before he was shipped overseas as a replacement early in January.

"I don't think it's fair to put these young boys into the front line with only have training as a rifle mans," Taft said.

Last June 7 the War Department set up a general policy that the infantry and armored forces would use no one under 20 in combat and would attempt to give all of them a year's training.

On Dec. 7, however, Robert Patterson, Undersecretary of War, said that urgent military requirements had necessitated a revision of this policy, but that in general a minimum of approximately eight months would elapse between induction and combat service.

until to Congress now.

What the Young Ladies Heard on Their Visit.

Unfortunately, we have been unable to obtain any of the young ladies' reports of their annual Washington Birthday visit to Congress. But this we do know:

In the House they heard the chaplain, the Rev. James Shera Montgomery, D.D., pay his respects to the Father of His Country with the invocation:

"Almighty God, today we honor him whose dust sleeps on the banks of yonder river. . . . Keep us true to our trust and responsibility

William the Conqueror

War Mobilizer Byrnes

He ordered "diamond" fires restored . . . He takes a lesson from tough old William.

and animate us with the same power that the foundations of our republic may remain secure to bless mankind forever."

And then came Missouri's youthful Marion T. Bennett (born 1914) to read Washington's Farewell Address with the ringing line:

"There can be no greater error than to expect or calculate upon real favors from nation to nation. It is an illusion which experience must cure. . . ."

And then, hard on the heels of this came the pay-off—and we haven't been able to learn how the charming young ladies will report it to their teacher.

Up leaps Representative Frank (Left) Hook of Michigan, ex-greasy worker and a very hard-boiled guy, to announce that in his opinion brother Congressman Rankin of Mississippi is "as he remembers it—"a dirty liar" or, as the official reporter noted it down "a God damned liar."

But at this point, the two worthy and distinguished members of the Democratic Party (Hook of CIO and Rankin of Mississippi) started to step it out and, we painfully report it went into a lot of hair-pulling with only one choice punch landed.

The only member who Sunday punch, tossed by Rankin with his right, landed smack on Hook's nose. We wish to point out that Hook out-weighed his opponent by 40 pounds, had a 25 year advantage and was mighty slow on his feet.

The members of Congress are now properly embarrassed about the whole show.

As Pegler Sees It

Camp Shanks Another Example of Profits 'By Devious Means'

By WESTBROOK PEGLER

"WE CANNOT TOLERATE THOSE who put on a false front, who are not honest and sincere and employ their offices as a decoy and coverup for personal gain through devious means."

In this charge to a Federal grand jury about to investigate rocking corruption in the building of a great army embarkation camp at Orangeburg, N. Y., Grover M. Moscowitz, judge, might have been referring to the Roosevelt Government from March 4, 1933 to the date of these presents. The inquiry is limited, however, to Camp Shanks, a mine though faithful example of the same sordid, greedy cynicism which has exploited the very Presidency, itself, "for personal gain through devious means" in which the profiteers reasonably may have thought they had the benefit and blessing of distinguished precedent.

Grover M. Moscowitz

The Department of Justice, belatedly, and not until the horse has been stolen, fried and eaten, has now taken a critical view of such conduct on the narrow scale. For that, possibly, the people should be grateful.

We may doubt, however, that Judge Moscowitz expressed the general policy of the D. of J., and one fears that his sweeping disapproval of the exploitation of office "for personal gain through devious means" will be entered in his dossier and held against him should he ever be proposed for promotion to the Court of Appeals. This does smack of lese majesty.

JUSTICE HAS MOVED DELIBERATELY, NOT TO SAY RELUCTANTLY, in this case. It was a stench two years ago whose fumes were wafted up the Hudson River as far as Newburgh where Edward G. O'Neill, representing the Attorney General of the State of New York, was investigating the colossal shakedown of workers and hard-rock men, miners and a variety of other toilers by two of the foulest union rackets of the Roosevelt adherence.

These were the Hodcarriers' Union, which had gone more than 30 years without a convention or a legal election of officers, and the Operating Engineers' Union dominated by William E. Maloney, of Chicago and Joe Fay, a drunken thug and politician of the Frank Hague chapter of the Party of Humanity. For years these rackets had robbed and persecuted the common man for whom the heart of Henry Wallace ever bleeds while, in his political character, he readily accepts the help of their oppressors.

They were toiling dangerously far underground on the Delaware Aqueduct, a tunnel worming under mountains and rivers to bring water to New York, financed largely with Federal money. The total cost was $300,000,000 and much of it was shakedown and graft. Although this was a violation of [illegible] Herbert H. Lehman, Roosevelt's New York satrap, [illegible] himself of this outrage, then so long established as to have become an institution. Then with Tom Dewey sweet to move in behind him, Lehman sent O'Neill, a Democrat, down to Newburgh to root the rascals out.

O'Neill is a politician on his own end, as a sideline while running his inquiry, he conducted a radio program on a local station looking to his own future as a personality and an influence, available for private progress and public office in the region thereabouts.

Board to Probe Red Teaching

Pupils Cite Praise of Radical Press

Evidence that certain teachers in the city's public schools are encouraging the reading of Communist publications by pupils today was being investigated by the Board of Education.

The inquiry was the result of a survey conducted by the New York Journal-American, following a number of complaints made by pupils.

The complaints reveal that some radical-minded teachers no longer use the old-time Communistic subterfuge to indoctrinate the adolescent minds with ideologies inimical to the American way of life.

NOW USE DIRECTIVE

Instead, strong invention is now the approach, as the letter from one pupil discloses. It read, in part:

"I am a pupil in Walton High School in the Bronx. Our teacher tells us not to read that yellow sheet and that other filthy, lying sheet."

These references were to leading newspapers which are consistently opposed to Communistic doctrines and which are constantly campaigning to preserve American institutions. The radical teachers call these "the opposition press."

PRAISE RED PRESS

On the other hand, the Communist-minded teachers have only accolade for the Communist press. As instance this expression used by one teacher in urging her pupils to read Communist newspapers:

"They are the only clean papers for us to read. They are the only papers for any clean person to read."

Dr. Frederick Ernst, associate superintendent of schools, said that similar complaints on the reading of newspapers in schools are received on an average of three times a year. Referring to the pupil's letter revealing the teacher's attack on the American press, Dr. Ernst said:

"If what the writer says is true, that teacher obviously is disobeying the request of Superintendent Dr. John E. Wade. We will investigate to ascertain the facts of the situation."

HIGH SCHOOL IMPORTANCE

Dr. Ernst said that the study of newspapers has the greatest field in the academic high schools [illegible] he said. "No newspaper is to be censored by the system of distribution. The policy of the Superintendent of Schools is that no teacher may forbid a paper or recommend one. Pupils may bring the paper they wish to."

However, a symposium obtained from pupils at Walton High School tends to show disregard for the Board of Education's interpretation.

Most of the pupils questioned

HERE TODAY . . . Mayfair [illegible] like New Years Eve until [illegible] of dining and dancing [illegible] highballs and champagne [illegible] past midnight today. Cafe Society packed with merrymakers [illegible] ing hour. Toasts were drunk [illegible] sung but at the same hour [illegible]

How Clubs To Meet

This is a [illegible] spots will be affected by the [illegible] effective Tuesday:

COPACABANA, 10 E. 60th st.—Big room shuttered. 200 of 265 employes fired. Show than Gene Osser's orchestra [illegible] stage Conga Room remains [illegible]

EL MOROCCO, 154 E. 54th st.—Trying to keep on all of its 125 employes although one of eight three orchestras may have to go will open at 5 p. m. two hours earlier than [illegible] until 11:30 p. m.

CAFE LA VIGAN, Broadway and 49th st.—Rotation [illegible] plan adopted to keep on all of 274 employes; two floor shows nightly instead of three at 7 and 10 p. m.

LATIN QUARTER, Broadway and 48th st.—Dismissal notices [illegible] of 725 employes, including one orchestra, of seven [illegible] will open at 5 p. m. instead of 6:30 p. m.; floor shows at 7 [illegible]

[illegible] W. 49th st.—No discharges planned 200 employes but Billy Rose owner says he will close if gross drops more than $5,000 a week. [illegible] open 5 p. m.; shows at 7 and 10 p. m.

STORK CLUB, 3 E. 53rd st.—[illegible] One of three orchestras will go; no other cuts planned in 300-employee payroll.

MONTE CARLO, Madison ave. and 56th st.—Hopes to keep all of its 176 employes; closes at [illegible]

Herbert H. Lehman, Roosevelt's New York enemy, bestirs himself of this outrage, then so long established as to have become an institution. Then with Tom Dewey about to move in behind him, Lehman sent O'Neill, a Democrat, down to Newburgh to root the rascals out.

O'Neill is a politician on his own and, as a sideline with running his inquiry, he conducted a radio program on a local station hoping to his own future as a personality and on influence. Available for private practice and public office in the region thereabouts.

QUITE REASONABLY HE WAS STILL IN THE PRELIMINARY STAGES of his inquiry when time ran out for the Lehman Administration and Dewey was forced to choose between disarming a job under way to turn out a Democratic holdover, and permitting him to carry on with both his official duties and his stadium. Dewey kept him on with an additional appropriation and O'Neill's results, finally, were a compromise between scream and failure.

He reached down into Frank Hague's nearby Jersey Derby to grab and exhibit a professional criminal who once had performed the worthy political service of driving the Socialist, Norman Thomas, out of Newark when Thomas attempted to make a speech, by pelting him with eggs. He broke up the union racket on the squadron job just about the time that the job was petering out anyway. Some of his convictions failed on appeal but meanwhile Mr. O'Neill had thoroughly familiarized himself with not only the squadron graft but the looting of the Treasury at Camp Shanks.

Although Camp Shanks has been a matter of common knowledge for two years, being first exposed by imitative newspaper reporting, the Department of Justice has only now begun to present the facts to a Grand Jury. O'Neill, himself, has been working entirely for the Department of Justice ever since Dewey finally moved him off.

The squadron racket with its overhead ran from both flanks, the army, because the squadron) and camp jobs overlapped both in time and in guilty personnel. Actually, he was learning about Shanks while working on the squadron-racket.

IN NORMAL TIMES UNDER CONDITIONS OF STANDARD MORALITY and official ethics and competence, it could be taken for granted that in the present case the Department of Justice was determined to investigate thoroughly and prosecute regardless of politics. However, the Department of Justice has never seen the day whether in the time of Grant or Harding, when its standards were as low and its politics as cynical and contemptuous of right and the public interest, as they are today.

Therefore the charge of Judge Mancuso to the Grand Jury, sincere and righteous though it was, may be flawed in the final results even though convictions may be had. There can be no reversals on appeal and, failing that, there is always the example of Presidential clemency to Earl Browder.

Camp Shanks is a political suburb of the Hague machine, a projected and virtual subdivision of the party of Roosevelt, Hopkins, Jake Wallace and Sidney Hillman. The Department of Justice demurely refrained from interfering during the commission of the crimes and during as every lawyer and criminal of experience knows, is a priceless factor in a crook. During such delays, witnesses disappear, they die and they forget. Records have a tendency to walk off unassisted by mortal hand.

If then in the end, there is no punishment of men, whether military or political or both, who employed "their offices as a forum and never-up for personal gain through devious means," that should be no occasion for surprise.

From the White House down through the entire rackets, the WPA, and the Farm Security Administration, this has been the accepted rule of conduct since 1933. To send such men to prison for such crimes would be a denial of due process under the unwritten law of the land.

(Further information coming to hand shows us to be on all the list of which, so far as my knowledge goes, Harold Ickes never has been guilty of. An attorney who served in the case states that Mrs. Frank Allen, the mother of a family of minor children, no longer having married to their father when he died of injuries suffered in the automobile accident in which the late Fred Mrs. Ickes lost her life. Thus it was not the "widow" whom Mr Ickes served in the Supreme Court of New Mexico in a suit for $7,500, but the "estate," such as it was which descended to the children. Moreover, Mr. Allen was bonded for $7,500 which the indemnity company might have had to pay had the "estate" lost the suit. With the help of the attorney the "estate" defeated Mr. Ickes. The attorney says in addition, forces stolen that funeral expenses were among the items of the plaintiff. These corrections are offered in the interests of accuracy and fairness to a man who publicly called himself a scoundrel, showing an advantage and apparently owns.)

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appear to be in dispute as to the system of distribution. The policy of the Superintendent of Schools is that no teacher may forbid a paper or recommend one. Pupils may bring the papers they wish, in."

However, a committee obtained from pupils at Walton High School tends to show discrepancy for the Board of Education's instructions.

"Most of the pupils questioned were reluctant to reveal the names of teachers. From their attitudes it was apparent that some overstep what was said.

But there was no hesitancy in talking of the teachers' attitude toward newspapers opposed to Communism.

SOME BOOKS FORBIDDEN

One girl, walking in Jerome ave with her mother, said she was prohibited from that high school last year.

"The [illegible] permitted to bring the Daily Worker — — — or the New York Times — — — into the study hall," she said, mentioning the names of two New York dailies. "We were always told what papers to read."

Also cited was the action of two of the teachers who were opposed to their Communist colleagues. The entire Communist dailies and four pupils told by the teachers who advocate the reading of Communist newspapers.

The letter from the pupil at Walton, however, gave the name of a teacher who, she accused of constantly urging the American press. An investigation revealed that on Feb. 1 last, this teacher was appointed to a regular post, having acted as a substitute for 13 years. Her husband is a professional man.

Jewish Fund Agencies Split

For the second time since it was founded six years ago, the United Jewish Appeal was dissolved today. Its two component parts, the American Jewish Joint Distribution Committee and the United Palestine Appeal, organized in a formal over organizations division of funds.

Under the new arrangement, announced by Henry J. Goodman, executive director of the UJA, 78 per cent of the proceeds of the campaigns of the two bodies, which raise funds for Jewish relief and rehabilitation in all countries, will go to the overseas agency, known as the Joint Distribution Committee. Twenty-two per cent will be retained by the United Palestine Appeal, and the remaining 78 per cent will be distributed by the United Jewish Appeal of Greater New York, which will be conducted with the same honorary chairmen of the [illegible] administration.

Italian Scout Ceremony

[illegible]

W. 49th st.—No dissatisfaction among 300 employees but Billy Rose, owner, says he will close if [illegible] more than $3,500 a week. Opens 8 p. m.; shows on 7 and 10 p. m.

STORK CLUB, 3 E. 53rd St.—One of three orchestras will go; no other cuts planned in 250 employee payroll.

MONTE CARLO, Madison ave and 59th st.—Hopes to [illegible] all of its 170 employees; dancing limited one hour, to 9 p. m.; no dancing until after 8.30 p. m.

THE VERSAILLES, 151 E. 50th st.—Expects to fire about 25 per cent of its 300 employees, including one of two orchestras; two floor shows dropped, leaving only 6 and 10 p. m. shows.

JACK DEMPSEY'S, 1619 Broadway—May let go "some" of its 150 employees, but will wait to see results of curfew on business.

CAFE SOCIETY DOWNTOWN, 0 Sheridan sq.—Will try to keep all of club's 60 employees, will open the dinners at 5.30 instead of 7 p. m.

CAFE SOCIETY UPTOWN, 158 E. 58th st.—No immediate firings contemplated, will [illegible] open on Sundays; two floor shows instead of three; will open at 4.30 p. m. instead of 7 p. m.

GREENWICH VILLAGE INN, 5 Sheridan sq.—Will retain all of its 60 employees "as long as possible."

VILLAGE VANGUARD, Seventh ave., near 11th st.—Report 50 per cent loss in revenue, but so far has not made payroll cuts.

WALDORF-ASTORIA HOTEL, Park ave. and 49th st.—Will close Waldorf Room, lounge restaurant and bar at 11.45 p. m.

PALAIS ROYALE, 48th [illegible] Park ave., [illegible] show. E. The Stage—London

[fols. 1151-1156] CERTIFICATE OF REASONABLE DOUBT

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York at the County Courthouse thereof, at Foley Square, in the Borough of Manhattan, City of New York, on the 23 day of April, 1945.

Present: Hon. Isidor Wasservogel, Justice.

[Same Title]

The defendants, Joseph S. Fay and James Bove, having moved pursuant to Sections 527 and 529 of the Code of Criminal Procedure for a Certificate that a reasonable doubt exists whether the judgment of conviction should stand upon appeal and for the admittance of said defendants to bail pending the determination of said appeal; and said motion having come on for hearing before me and the People of the State of New York having appeared by Honorable Frank S. Hogan, District Attorney for the County of New York, and the defendant, Joseph S. Fay, having appeared by Thomas R. Fay and Robert J. Fitzsimmons, his attorneys, and the defendant, James Bove, having appeared by Moses Polakoff, his attorney, and argument having been had and due deliberation and consideration thereof having been had by me,

Now, upon reading and filing the notice of motion dated the 13th day of April, 1945, the petition of Robert J. Fitzsimmons and Moses Polakoff, verified the 13th day of April, 1945, and the Stenographer's Minutes of the trial of said [fol. 1157] defendants before the Supreme Court of the State of New York, County of New York, at a Criminal Term thereof, and upon filing the opinion of the Court, it is

Ordered, that this application by the defendants, Joseph S. Fay and James Bove, be, and the same hereby is granted, and that a Certificate be and hereby is granted that there is a reasonable doubt whether the judgment of conviction of the defendants, Joseph S. Fay and James Bove would stand upon appeal upon the ground that there is a question of law whether the court committed prejudicial error in connection with the cross examination of the character witnesses produced by the defendant, Joseph S. Fay in-

volving collateral activities impliedly engaged in by the defendant, Joseph S. Fay and on the further ground that there is a question of law whether the trial court committed prejudicial error in connection with its refusal to defer the reading of the testimony of the witness Walsh as requested by the jury and in failing to recall the jury and read to the jury that portion of the cross examination of the witness Walsh requested by the attorneys for the defendants, and it is further

Ordered that each of said defendants, Joseph S. Fay and James Bove, be and each hereby is released from custody until the entry of an order by the Appellate Division of the Supreme Court, First Judicial Department upon the appeal taken by each of them from the judgment of conviction rendered against them in the Supreme Court, County of New York on the 5th day of April, 1945, upon each of the defendants' above named execution and delivery of a bond, [fol. 1158] with sufficient security in the sum of Twenty Five Thousand ($25,000) Dollars as to each of the defendants, Joseph S. Fay and James Bove, conditioned upon their return to custody and that each defendant above named will in all respects abide the orders and judgment of the Appellate Division of the Supreme Court, First Judicial Department, upon said appeal, and that he will surrender himself on execution of the judgment of said Supreme Court of the State of New York, County of New York, upon its being affirmed or modified, or upon the appeal being dismissed, or if the Certificate of Reasonable Doubt granted herein be vacated as provided by law; and it is further

Ordered, that the Clerk of the County of New York be, and he hereby is directed to return to the attorneys for the defendants the transcript of the Stenographer's Minutes heretofore filed in connection with this application, and it is further

Ordered that any Justice of the Supreme Court of the State of New York, County of New York may take said bond.

Enter.

I. W., Justice of the Supreme Court of the State of New York.

[fol. 1159] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY, SPECIAL TERM—PART I

PEOPLE OF THE STATE OF NEW YORK,

against

JOSEPH S. FAY and JAMES BOVE, Defendants-Appellants

MEMORANDUM OPINION OF MR. JUSTICE ISADOR WASSERVOGEL ON GRANTING CERTIFICATE OF REASONABLE DOUBT

WASSERVOGEL, J.:

The defendants have been convicted of the crimes of conspiracy and extortion. They were tried on a single indictment containing seven counts. Conviction was under the first and seventh counts. As to the remaining five, the court dismissed one count, the jury acquitted the defendants on three and was unable to reach a verdict upon the fifth.

The defendants move under Section 527 of the Code of Criminal Procedure for a certificate of reasonable doubt as to whether the convictions will stand upon appeal, and for the fixing of bail pending such appeal.

The standard applicable upon a motion of this character is simply whether there are presented questions of sufficient gravity to warrant a review of them on appeal prior to the imprisonment of the defendants.

Various specifications of error have been called to the attention of the court. I will, however, refer only to two general matters.

[fol. 1160] 1. It is the contention of the defendants that prejudicial error was committed in connection with the cross-examination by the District Attorney of character witnesses called on behalf of the defendant Fay. This cross-examination of a number of witnesses followed a general pattern of repeated questioning as to their reading of or hearing of a series of various incidents purportedly occurring in the career of such defendant over the past ten years or more. Direct proof of such alleged activities was of course inadmissible, and by the same token no opportunity of refutation by the defendant of the facts implied by such questions was possible under the rules of evidence. It is contended that the collateral activities involved in such questions were of such a character, that their presentation to a jury

through the medium of cross-examination which could not be challenged, seriously prejudiced both defendants and that the scope of such examination violated the law applicable to the examination of character witnesses.

2. It is also contended that error was committed in connection with certain requests of the jury and related incidents which occurred in the early hours of March 15, 1945. The jury had begun its deliberations at 11:21 A. M. on March 14th and at 12:30 A. M. on the 15th sent the court a note requesting the re-reading of the lengthy testimony of one Walsh, a witness called by the People. The foreman stated that some of the jurors had said that they were tired and would prefer to hear the testimony in the morning. The court rejected the request to defer the matter. It appears from the record that the jury was particularly [fols. 1161-1166] concerned with the direct and cross-examination relating to certain conferences. Portions of the testimony were re-read and the jury retired at 1:05 A. M. with the acquiescence of counsel. Thereafter counsel for the defendants advised the court that further study of the testimony disclosed that certain portions of the cross-examination relating to the conferences had not been re-read to the jury and requested that it then be done. The court denied this request. It is the contention of the defendants that the refusal to defer the re-reading of the testimony until morning and to recall the jury to re-read the omitted portion of the cross-examination constituted prejudicial error.

The matters referred to above present questions of law sufficient for the consideration of the appellate court and meet the test to be applied in the consideration of applications of this kind.

Motion for a certificate of reasonable doubt is granted. Bail for each defendant will be fixed in the order to be entered herein on one day's notice.

Dated, April 23, 1945.

I. W., J. S. C.

Notice of Appeal to Court of Appeals.

COURT OF APPEALS,
STATE OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

JOSEPH S. FAY and JAMES BOVE,
Defendants-Appellants.

Sirs:

PLEASE TAKE NOTICE that the defendants, Joseph S. Fay and James Bove, hereby appeal to the Court of Appeals from a certain judgment or order of the Appellate Division of the Supreme Court for the First Department, dated December 20, 1945, and entered in the office of the Clerk of said Appellate Division, affirming the judgment of conviction rendered against them, in the Supreme Court of New York County, on the 5th day of April, 1945, and from each and every part thereof, including the order denying the defendants' motion for an inspection of the Minutes of the Grand Jury, the order denying the defendants' motion for a Bill of Particulars, the order granting the motion of the District Attorney for a trial before a Special Jury, the order overruling the defendants' challenge to the Special Panel of Jurors and the order denying the defendants' motion to set aside the verdict of the Jury on the ground that it was contrary to law, and all other and intermediate orders herein made;

Notice of Appeal to Court of Appeals.

PLEASE TAKE FURTHER NOTICE that this appeal was taken pursuant to leave granted by Honorable John T. Loughran, Chief Judge of the Court of Appeals, on December 21, 1945, in which it was certified that there are questions of law involved which ought to be reviewed by the Court of Appeals.

Dated, New York, N. Y.
December 24, 1945.

Yours &c.,

THOMAS R. FAY

and

ROBERT J. FITZSIMMONS,
Attorneys for Defendant-Appellant
Joseph S. Fay,
654 Madison Avenue
Borough of Manhattan,
City of New York

MOSES POLAKOFF,
Attorney for Defendant-Appellant
James Bove,
475 Fifth Avenue,
Borough of Manhattan,
City of New York

To:
FRANK S. HOGAN, ESQ.
District Attorney of New York County

CLERK OF THE SUPREME COURT OF THE
COUNTY OF NEW YORK

Certificate of Reasonable Doubt and Certifying Question of Law.

COURT OF APPEALS:
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

JOSEPH S. FAY and JAMES BOVE,
Defendants-Appellants.

I, JOHN T. LOUGHRAN, Chief Judge of the Court of Appeals, do hereby certify that a question of law is involved in the above entitled matter which ought to be reviewed by the Court of Appeals.

I further certify that there is a reasonable doubt that the conviction herein will stand and, accordingly, continue bail in the case of the defendant Fay, pending appeal to the Court of Appeals in the sum of $25,000.

Dated, December 21, 1945.

JOHN T. LOUGHRAN
Chief Judge

Order of Affirmance.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of December, 1945.

Present—Hon. Francis Martin,
Presiding Justice,
" Alfred H. Townley,
" Edward S. Dore,
" Albert Cohn,
" Joseph M. Callahan,
Justices

15949

People of the State of New York,
Respt.,

vs.

Joseph S. Fay and James Bove,
Applts.

An appeal having been taken to this court by the defendant Joseph S. Fay from a judgement of the Supreme Court, New York County, rendered on the 5th day of April, 1945 and from each and every intermediate order therein made;

And an appeal having been taken to this court by the defendant James Bove from the judgement of the Supreme Court, New York County, rendered on the 5th day of April, 1945, said appeal bringing up for review an order of the Court of General Sessions of the County of

New York denying defendants' motion for permission to inspect Grand Jury minutes, an order of the Supreme Court, New York County, entered on or about the 8th day of February, 1945 granting the People's motion for a trial before a Special Jury, and an order of the Supreme Court, New York County, entered on or about the 9th day of February, 1945, denying defendants' motion for a bill of particulars of the indictment.

And said appeal having been argued by Mr. Stephen Callaghan of counsel for the appellant Joseph S. Fay, by Mr. Moses Polakoff of counsel for the appellant James Bove, and by Mr. Whitman Knapp of counsel for the respondent; and due deliberation having been had thereon,

It is ordered and adjudged that the judgements and orders so appealed from be and the same are hereby, in all things, affirmed. (Two of the Justices dissent and vote to reverse the judgement of conviction against both defendants and order a new trial.)

F. M.

APPELLATE DIVISION OF THE SUPREME COURT,
FIRST JUDICIAL DEPARTMENT,
Clerk's Office, County of New York

I, GEORGE T. CAMPBELL, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above entitled action or proceeding, and entered in my office on the 20th day of December 1945, and that the original case or papers upon which said appeal was heard are hereunto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 20th day of December 1945.

GEORGE T. CAMPBELL,
Clerk

SEAL

Prevailing Opinion of Appellate Division.

SUPREME COURT, APPELLATE DIVISION,

FIRST DEPARTMENT, NOVEMBER, 1945.

FRANCIS MARTIN, *P. J.*
ALFRED H. TOWNLEY,
EDWARD S. DORE,
ALBERT COHN,
JOSEPH M. CALLAHAN, *JJ.*

15949

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

JOSEPH S. FAY and JAMES BOVE,
Appellants.

Separate appeals by the defendants from judgments of the Supreme Court, New York County, convicting defendants of the crimes of conspiracy and extortion (Penal Law Sections 580, 850 and 851), said appeals bringing up for review an order denying a motion for an inspection of the minutes of the grand jury and other intermediate orders.

STEPHEN CALLAGHAN of counsel (Thomas R. Fay, Robert J. Fitzsimmons and Ralph Stout with him on the brief) for appellant Joseph S. Fay.

MOSES POLAKOFF of counsel (Samuel Mezansky with him on the brief) for appellant James Bove.

Prevailing Opinion of Appellate Division.

WHITMAN KNAPP of counsel (Joseph A. Sarafite, John D. J. Moore and Vincent A. G. O'Connor with him on the brief; Frank S. Hogan, District Attorney) for respondent.

PER CURIAM:

One of the defendants-appellants, Joseph S. Fay, called thirteen character witnesses who testified to his reputation for honesty and fair dealing. It is claimed that the District Attorney improperly cross-examined eight of such witnesses.

A defendant who calls character witnesses makes his own reputation a subject of inquiry at the trial and the People have the right to cross-examine such witnesses upon the subject of inquiry thus presented and may properly ask if the witnesses heard particular reports derogatory to defendant's character to determine credibility and to show the witnesses' grounds of knowledge, provided the inquiry is directed to the witnesses' hearing of the disparaging report as negativing the reputation and provided the inquiry is conducted in good faith (*People* v. *McKane*, 143 N. Y. 455, 473, affirming Gen. T. 2d Dept., 80 Hun 322, 347; *People* v. *Laudiero*, 192 N. Y. 304, 309; *People* v. *Jefferey*, 82 Hun. 409, 413; *People* v. *Manganaro* (1st Dept.), 261 App. Div. 891; *People* v. *Watson* (Gen. Term, 1st Dept.), 54 Hun 637; Opinion in 1 N. Y. S. *Lawrence* v. *United States*, C. C. of A., 56 Fed. (2d) 555, 556; III Wigmore on Evidence (3rd Ed.), Section 988, and cases cited in almost all jurisdictions; see also *The State* v. *Crow*, 107 Mo. 341, 346-7).

Prevailing Opinion of Appellate Division.

Discussing character witnesses, Wigmore says (3d ed., Vol. 3, §988) (op. cit. p. 618):

> "* * * Such a witness virtually asserts either (a) that the testifier has never heard any ill spoken of the other or (b) that the sum of the expressed opinion of him is favorable. Now if it appears that this sustaining witness knows of bad rumors against the other, then, in the first instance, his assertion is entirely discredited; while, in the second instance, his assertion is deficient in good grounds, according to the greater or less prevalence of the rumors. On this principle, then, it is proper to probe the asserted reputation by learning whether such rumors have come to the witness' knowledge; for if they have, it is apparent that the alleged reputation is more or less a fabrication of his own mind."

In People v. McKane (supra), the cross-examination of character witnesses included questions about accusations appearing in the public press and the Court of Appeals said (p. 473):

> "The defendant having made reputation a subject of inquiry, the People had the right to put before the jury just what that reputation was, though it included the ability to influence and control elections."

In People v. Jefferey (supra), the Court held:

> "Nor do we thing that the court erred in allowing the witness Levan to testify that Jefferey had been indicted; that he saw in the papers that he had. The defendant had made Levan his witness for

> the purpose of proving good character; on that subject the People could properly cross-examine him, and as he had testified to the good character of the prisoner, the People could properly ask him if he had heard reports derogatory to his character. (*Carpenter* v. *Blake*, 10 Hun. 358-360; *Leonard* v. *Allen*, 11 Cush. 241-245.)"

The matters here inquired into were not irrelevant to the subject or scope of the inquiry presented by calling thirteen character witnesses but related to the traits of character defendant Fay had put in issue. Practically all of the character witnesses cross-examined admitted having some knowledge or information of one or more of the reports about which he was questioned.

The court without exception correctly charged the rule relating to character witnesses; told the jury that Fay's character had nothing whatever to do with the defense of the other defendant Bove; no exceptions and no request for any additional charge on the subject was made. Fay's counsel fully and freely argued the issue in his summation. Elsewhere in the charge the jury had been instructed that no question is evidence; that it is the answer that is evidence. Under all the circumstances disclosed, the prosecution's inquiry cannot be held to have been conducted in bad faith and does not present prejudicial reversible error.

On direct-examination by the People, the witness Walsh testified only to the effect that he had a conversation with Shea preceding his meeting with the defendants. On cross-examination for defendant Fay, the subject-matter of Walsh's conversation with Shea was inquired into to sug-

gest that Shea had said it was a good thing to "make an arrangement" with the labor leaders to protect the job, particularly against the sandhogs' union. Part of the conversation was elicited affirmatively; the inquiry of defendant's counsel as to what Shea told the witness regarding protection from the sandhogs was answered in the negative; but the questions on cross-examination related to what Shea had told the witness Walsh before Walsh went to the meeting with defendants.

In that state of facts the People were entitled to bring out the entire conversation, the court properly instructing the jury that the evidence was competent only as to defendant Fay and that they should disregard it so far as defendant Bove was concerned. The re-examination of a witness is largely in the discretion of the court. Defendant having chosen to open the door as to the conversation, it was proper that the jury should be placed in possession of what it actually was (*People* v. *Buchanan*, 145 N. Y. 1, 24).

The trial court in a comprehensive and evidently fair charge that adequately protected defendants' rights submitted the issue of fact to the jury and the jury found both defendants guilty on the first and seventh counts of the indictment. No prejudicial reversible error is shown. Both errors especially relied on for reversal relate to defendant Fay and not to defendant Bove.

The judgments of conviction and the orders should be affirmed. Martin, *P.J.*, Townley and Dore, *J.J.*, concur in per curiam opinion; Cohn, *J.*, dissents and votes to reverse the judgment of conviction against each defendant and order a new trial, in an opinion in which Callahan, *J.*, concurs.

Judgments and orders affirmed.

Dissenting Opinion of Cohn, J.

SUPREME COURT, APPELLATE DIVISION.

First Department, November, 1945.

Francis Martin, *P.J.*,
Alfred H. Townley,
Edward S. Dore,
Albert Cohn,
Joseph M. Callahan, *J.J.*

15949

People of the State of New York,
Respondent,

vs.

Joseph S. Fay and James Bove,
Appellants.

Cohn, *J* (dissenting):

The rule permitting the prosecution in cross-examining character witnesses called by a defendant in a criminal case to inquire whether rumor concerning particular acts of defendant's alleged misconduct had come to the witnesses' knowledge, is one that may easily lead to unfairness unless strictly supervised (Wigmore on Evidence, 3rd Ed. V. III Section 988).

In the present case eight witnesses called by defendant Fay as to his previous good reputation were subjected to extended cross-examination relating to transactions in which Fay had impliedly participated.

While generally the questions took the form as to whether the witness had "heard" or "read"

the matters recited, on at least two occasions the form of interrogation was whether the witness recalled or remembered the transactions or event referred to.

In addition, the scope of the examinations included reference to rumors concerning such irrelevant matters as (1) whether a complaining witness against Fay upon another prosecution had disappeared; (2) charges made against Fay in civil litigation; (3) Fay's activities in carrying on certain business which involved "divided loyalty" to his labor union, and the statements of labor officials characterizing such activities; (4) the nature of a resolution being debated at a labor convention (referred to as an "anti-racketeering" resolution), upon which occasion Fay had allegedly committed an assault on a speaker; (5) statements made by public officials characterizing an association formed by Fay as "a racket"; (6) a charge that a holding company leased for an inadequate rental a saloon in which Fay was interested.

The narrow issue being tried here was whether payment by contractors had been induced by implied threats or otherwise.

If rumors of matters so far removed from the charge being tried, but at the same time casting indirect and insidious insinuations concerning the likelihood of guilt of such charge, are to be admitted solely for the purpose of attacking a witness's estimate of reputation, then at least the trial court should carefully admonish the jury as to the weight and effect to be given to such evidence. No adequate instruction on that score was given here.

Error was also committed in allowing the People's witness Thomas J. Walsh to testify in his redirect examination, over objection and ex-

ception, to a conversation had in the absence of defendants with Charles Shea (who died two years before the trial). The Court decided that such hearsay testimony was admissible on the theory that defendants had opened the door to everything that Shea had said to Walsh because of questions asked by Fay's counsel in cross-examination of Walsh. The cross-examination did not open the door to unrestricted testimony by Walsh as to the conversation he had with Shea.

It is the rule that where part of a conversation has been given in evidence by one party, the other party is entitled to bring out the entire conversation. (*Platner* v. *Platner*, 78 N. Y. 90, 103.) However, on the trial no part of the conversation between Walsh and Shea had been elicited by the defendants, hence the rule is not applicable. "This was not a case where a part of a conversation was given, the rest was needed in order to present the situation fairly", (*People* v. *Flaherty*, 162 N. Y. 532, 545.)

Evidence of the alleged conversation was harmful in that it purported to show that Shea had been approached on his own job by Fay and perhaps Bove and other labor leaders and that these leaders had asked for certain sums of money; that he (Shea) had never paid money before and was very loath to do it; that he was persuaded to do so by these labor leaders on the plea that it would be to the best interests of his job and that these same leaders wished to see Walsh.

While the Court received this testimony only as against defendant Fay, it undoubtedly had a serious adverse effect upon his co-defendant as well, for, according to the claim of the People,

Fay and Bove almost invariably acted together. By the jury's verdict it was demonstrated that the jurors believed the testimony of Walsh as to his payments to defendants and the criminal purpose of such payments. The manifest object of the challenged testimony given by Walsh was to show prior similar allegedly extortionate payments exacted by these very labor leaders from Shea, who was not available as a witness. Who can tell how much weight the jury in adjudging these defendants guilty gave to this incompetent hearsay testimony? It should not have been received for any purpose and its admission was highly prejudicial to both defendants.

For the foregoing reasons the judgment of conviction against both defendants should be reversed and a new trial ordered.

Callahan, *J.*, concurs.

Stipulation as to Exhibits.

COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

JOSEPH S. FAY and JAMES BOVE,
Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that Defendants' Exhibits 5, 6 and 7 need not be printed, photographed or photostated in the printed record on appeal, but the originals thereof may be handed up by either party so desiring on the argument or submission of the appeal herein with the same force and effect as though incorporated in the printed record on appeal.

IT IS FURTHER STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that Defendants' Exhibits 1, 2, 3, 4, 8, 9, 6 and 7 are to be printed in the record on appeal and the originals thereof may also be handed up by either party on the argument or submission of the appeal.

Dated: New York, April 17th, 1946.

FRANK S. HOGAN,
District Attorney.

ROBERT J. FITZSIMMONS

and

THOMAS R. FAY,
Attorneys for Defendant
Joseph S. Fay.

MOSES POLAKOFF,
Attorney for Defendant
James Bove.

Clerk's Certificate.

SUPREME COURT,

NEW YORK COUNTY

PEOPLE OF THE STATE OF NEW YORK,

—against—

JOSEPH S. FAY and JAMES BOVE,
Defendants.

State of New York,
County of New York—ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County,

DO HEREBY CERTIFY that the foregoing is a copy of the remittitur of the Appellate Division of the Supreme Court, First Judicial Department and of the Notice of Appeal to the Court of Appeals, the Certificate of Reasonable Doubt and Certifying a Question of Law granted by Hon. John T. Loughran, Chief Judge of the Court of Appeals, the Prevailing Opinion of the Appellate Division and the Dissenting Opinion of Cohn, *J.*, in the case of The People of the State of New York against Joseph S. Fay and James Bove now on file in my office, and that the same have been compared by me with the originals and are correct transcripts therefrom, and of the whole of such originals except exhibits not printed by stipulation.

Given under my hand and attested by my official seal this 24 day of April, in the year of our Lord one thousand nine hundred and forty-six.

ARCHIBALD R. WATSON,
County Clerk and Clerk of the
Supreme Court, New York County.

(Seal)

[fols. 1184-1185] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 23rd day of July in the year of our Lord one thousand nine hundred and forty-six, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding; John Ludden, Clerk.

THE PEOPLE, &c., Respondent,

ag'st

JOSEPH S. FAY and JAMES BOVE, Appellants

REMITTITUR—July 23, 1946

Be it Remembered, That on the 27th day of April in the year of our Lord one thousand nine hundred and forty-six, Joseph S. Fay and James Bove, the appellants in this cause, came here unto the Court of Appeals, by Thomas R. Fay and others, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People, &c., the respondent—in said cause, afterwards appeared in said Court [fol. 1186] of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Harold R. Medina, of counsel for the appellant Fay by Mr. Moses Polakoff, of counsel for the appellant Bove; and by Mr. Whitman Knapp, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendants argued that the decision of the Trial Court in granting the motion of the People for a special jury and in overruling the challenge of defendants to the special jury panel con-

stituted a denial of due process and a violation of their rights under the Fourteenth Amendment of the Constitution of the United States. This Court held that the granting of the motion of the People for a special jury and the overruling of the challenge of the defendants to the special jury panel was not a denial of due process or a violation of defendants' rights under the Fourteenth Amendment to the Constitution of the United States.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

[fol. 1187] And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, July 23, 1946:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 1188] ORDER ON REMITTITUR

At a Trial Term Part I (Criminal Term) of the Supreme Court, Held in and for the County of New York, at the Criminal Courts Building, in the City of New York, Borough of Manhattan, on the 8th day of August, 1946.

Present: Hon. William H. Munson, Justice.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

JOSEPH S. FAY and JAMES BOVE, Appellants

Whereas, heertofore, to wit: at a term of the Trial Term Part I, Criminal Term, of the Supreme Court, of the County of New York, held at the Criminal Courts Building, in the Borough of Manhattan, of said City, on the 15th day of March, 1945, the above-named appellants were in due form of law convicted by the verdict of a jury of a misdemeanor, to wit: Conspiracy (Penal Law, §580) and of a felony, to wit: Extortion (Penal Law, §§850, 851) whereupon, to wit, on the 5th day of April, 1945, then next ensuing, it was considered by the said Court and ordered and adjudged that each of said appellants, for the misdemeanor of Conspiracy whereof they were convicted as aforesaid, be confined in the New York County Penitentiary for a term of one year and to pay a fine of Five Hundred ($500.00) Dollars, and [fol. 1189] for the felony of Extortion whereof they were convicted as aforesaid, that each be imprisoned in the State Prison at hard labor for the term of not less than seven and one-half years nor more than fifteen years, the sentences to be served consecutively.

And whereas, the appellants aforesaid thereafter duly appealed from the said judgments to the Appellate Division of the Supreme Court of the State of New York for the First Department.

And whereas, at a Term of the Appellate Division of the Supreme Court, held in and for the First Department, to wit: at the Court House thereof in the County of New York, on the 20th day of December, 1945, said judgments of this Court were by the judgment of said Appellate Division in all things affirmed.

And whereas, the appellants aforesaid thereafter duly appealed from the judgment of said Appellate Division to the Court of Appeals of the State of New York.

And whereas, at a term of said Court of Appeals, held at the Capital in the City of Albany, on the 23rd day of July, 1946, the said judgment of said Appellate Division was by the judgment of said Court of Appeals in all things affirmed, and the record herein and the proceedings in the said last-mentioned Court upon the said appeal, were by the said judgment remitted to this Court, there to be proceeded upon according to law, as by the remittitur of said Court of Appeals now on file in this Court, more fully appears.

[fols. 1190-1191] Now, therefore, on reading and filing the said remittitur, and on motion of Frank S. Hogan, District Attorney, it is

Ordered, that said judgment of said Court of Appeals be and the same hereby is made the judgment of this Court, and it is further

Ordered, that said judgments of this Court so appealed from as aforesaid and so affirmed, and said judgment of the Appellate Division of the Supreme Court herein, be and the same are hereby directed to be enforced and carried into execution and effect.

Wm. H. Munson, Justice of the Supreme Court.

[fol. 1192] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 377

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1193] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 452

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1194] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD—Filed November 18, 1946

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Clerk of this Court, in printing the record herein for the use of this Court, omit the following folios appearing in the record now on file in this Court:

1. Folios 85 to 126, inclusive.
2. Folios 193a to 201, inclusive.
3. Folios 211 to 234, inclusive; but add at folio 235 appearances listed at folios 212-213.
4. Folios 1452 to 2461, inclusive.
5. Folios 2515 to 2819 to "(There was a conference at the Bench between Court and counsel, off the record.)"

[fol. 1195] 6. Folios 3347, beginning "Mr. McGeehan: There are no other motions, * * *," to 3435, inclusive.

7. Folios 3454 to 3465, inclusive.
8. Folios 3484 to 3495, inclusive.
9. Folios 3544 to 3549, inclusive.
10. Folios 3571 to 3573, inclusive.

Dated, New York, November 15th, 1946.

Robert J. Fitzsimmons, Attorney for the petitioner Joseph S. Fay. Moses Polakoff, Attorney for the petitioner James Bove. Frank S. Hogan, Attorney for The People of the State of New York. Whitman Knapp.

[fol. 1196] [File endorsement omitted.]

Endorsed on cover: Enter Moses Polakoff in No. 452. File No. 51241, 51316. New York Court of Appeals. Term No. 377. Joseph S. Fay, Petitioner, vs. The People of the State of New York. Term No. 452. James Bove, Petitioner, vs. The People of the State of New York. Petitions for writs of certiorari and exhibit thereto. Filed August 9, 1946, August 31, 1946. Term No. 377 O. T. 1946, 452 O. T. 1946.

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 9 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 377

JOSEPH S. FAY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND FOR STAY OF EXECUTION OF JUDGMENT.

ROBERT J. FITZSIMMONS,
Attorney for Petitioner.

HAROLD R. MEDINA,
Of Counsel.

THE COURT PRESS, N. Y. C.

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TABLE OF CASES CITED:

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OTHER AUTHORITIES CITED:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No.

JOSEPH S. FAY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND FOR STAY OF EXECUTION OF JUDGMENT.

Your petitioner prays that a writ of certiorari be issued to review the final order and judgment of the Court of Appeals of the State of New York (fols. 3553-3561), rendered on July 23, 1946 (upon which a final judgment was entered in the office of the Clerk of the County of New York on the 8th day of August, 1946—fols. 3562-3569), which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on the 20th day of December, 1945 (fols. 3508-3513), affirming a judgment of the trial court, the Supreme Court of the State of New York, New York County, entered on the 5th day of April, 1945 (fols. 2-5, 81-82). Petitioner prays, further, that the execution of said judgment be stayed pending its review by this Court.

Opinions of the State Courts.

The trial court rendered no opinion except the memorandum of Mr. Justice Munson on order deny-

ing defendants' motion for a bill of particulars (fols. 193a-195d), and the memorandum opinion of Mr. Justice Wasservogel granting a certificate of reasonable doubt (fols. 3475-3483).

The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, rendered a *per curiam* opinion (fols. 3517-3531), two of the justices of said Court dissenting in an opinion (fols. 3532-3542).

The Court of Appeals of the State of New York rendered no opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 *U. S. C. A.* § 344).

Question Presented.

The question presented is whether the trial and conviction of petitioner for the commission of a crime by a jury from which women and laborers were largely, systematically, and intentionally excluded, denied to petitioner his rights under the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved.

The pertinent statutory provisions are set forth in the Appendix to this petition.

The Manner in Which the Federal Questions Sought to Be Reviewed Were Raised in the State Courts.

The trial court, the Supreme Court of New York County, upon the application of the District Attorney of New York County (fols. 133-138), and over the objection of petitioner's counsel (fols. 163-174), entered an order on February 8, 1945, directing that the indictment of the petitioner be tried before a special jury (fols. 175-182). Special juries are authorized in New York County and in certain other counties by Section 749-AA of the *Judiciary Law* of the State of New York, which is reprinted in the Appendix hereto.

Thereafter, petitioner filed a written challenge to the special jury panel (fols. 182-195) in accordance with Sections 362-363 of the Code of Criminal Procedure of the State of New York.

The challenge to the special jury panel contained the following objections, among others:

* * * *

"3. Section 749-AA of the Judiciary Law is unconstitutional and void both on its face and as applied to the defendants in this prosecution because it is in violation of the United States Constitution, Amendment 14, Section 1, in that it denies to defendants the equal protection of the laws for the reasons hereinafter stated" (fols. 185-186).

"4. Section 749-AA of the Judiciary Law is unconstitutional and void both on its face and as applied to the defendants in this prosecution because it is in violation of the United States Con-

stitution, Amendment 14, Section 1, in that it violates due process of law" (fol. 186).

* * * *

"7. In actual practice the selection of special jurors has been for the purpose of obtaining persons of conservative views, and for the purpose of excluding laborers and persons of humble station in life. These juries are popularly known as 'Blue Ribbon' juries. It is well known that they represent the upper stratum of economic and social life in the County of New York and that they have a greater tendency to convict defendants accused of crime than the jurors chosen from the general list" (fols. 189-190).

* * * *

"10. That the special jury panel selected for the trial of this indictment was chosen in such a manner as to obtain jurors who have certain definite and biased opinions in favor of capital in the relationship between capital and labor, thus making them unfit as special jurors and particularly unfit to sit in judgment in this case, in violation of defendants' rights to a fair and impartial trial" (fols. 191-192).

"11. That the ordering of a special jury panel in this case and the method of its selection destroy the foundations of the jury system as provided for under the Federal and State Constitutions and the laws otherwise applicable thereto, and in violation of defendants' right to obtain an impartial jury" (fols. 192-193).

"12. The special jury panel selected in this case was obtained by excluding from jury service

all persons who might be understanding of the point of view of the laboring man and by weighing the list heavily against defendants because of the preponderance on said special jury list and on the panel for this particular case of executives, bankers, brokers, real estate operators, retired business men, merchants and other persons of like character and by the virtual exclusion from said jury list of trade union representatives, laboring people and women. This constitutes a discrimination in violation of the Constitution of the State of New York and of the United States against these defendants by reason of their class and economic interests" (fols. 193-194).

Testimony was taken on the charges contained in the challenge (fols. 235-414), and at the conclusion thereof the trial court denied the challenge (fol. 415), to which petitioner's counsel excepted (fol. 415).

After petitioner's trial and conviction, he appealed to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of conviction, and from each and every part thereof, and from each and every intermediate order therein (fols. 7-9), thereby bringing up for review the order denying the challenge to the jury panel (fol. 4).

While the federal questions here sought to be raised were argued before the Appellate Division, that Court said nothing about these questions in its *per curiam* opinion (fols. 3517-3531), nor were they treated in the opinion of the dissenting justices (fols. 3532-3542).

Petitioner then appealed to the Court of Appeals of the State of New York from every part of the judgment of the Appellate Division and appealed specifically, among other matters, from the order

overruling his challenge to the special jury panel (fols. 3499-3504).

The Court of Appeals affirmed the judgment without opinion. However, as stated in the remittitur issued by said Court (fols. 3557-3558), the federal questions here sought to be raised were considered by it.

Statement of Facts.

On May 17, 1943, an indictment (fols. 16-57) was filed against the petitioner, Vice-President of the International Union of Operating Engineers, and one James Bove, Vice-President of the International Hod Carriers, Building and Common Laborers' Union of America, charging them with conspiracy to commit and with actual commission of the crime of extortion by obtaining sums of money from contractors engaged in the construction of the Delaware Water Supply Project in the State of New York through fear induced by threats to these contractors of unlawful injury to their property if the sums of money were not paid. The indictment contained one conspiracy count and six counts charging substantive offenses of extortion against six different contractors. The indictment was filed in the Court of General Sessions for the County of New York, and upon petitioner's motion, the trial of the indictment was transferred to the Supreme Court of the State of New York (fols. 127-132).

Petitioner and James Bove were tried before a court and special jury. They were found guilty of the crime of conspiracy as charged in count one of the indictment, and of the crime of extortion as charged in count seven; the jury found them not guilty on

counts two, three and five and not guilty by direction of the court on count four. The jury was unable to reach a verdict with respect to count six (fols. 3290-3291).

On April 5, 1945, petitioner was sentenced upon the conspiracy count to a term of one year in the City Penitentiary, and the payment of a fine of $500.00; and, on the extortion count, to a term in the State Prison of not less than seven and one-half nor more than fifteen years, the sentences to be served consecutively (fols. 208-210, 3421-3426).

Since the questions raised by this petition relate solely to the composition of the jury panel from which petitioner's jury was selected, petitioner will restrict his statement to the facts pertaining to these issues.

As indicated, petitioner was tried by a special jury, commonly referred to as a "blue ribbon jury." In the State of New York there are separate panels of general jurors and special jurors (fol. 247). Both, however, have their source in the list of persons who are called to come to the office of the Division of Jurors to be examined for general jury duty.

The Division of Jurors for New York County obtains lists of prospective jurors from registration lists, tax lists, census lists, telephone directories, and the like (fol. 375). Notices are sent to persons whose names are thus obtained, requiring them to appear at the offices of the Division of Jurors to be examined for jury duty (fol. 373).

However, while women are equally eligible with men to serve on juries in the State of New York (*Judiciary Law* of the State of New York, § 502), the Division of Jurors never sends a notice to a

woman to appear to be examined for jury duty (fols. 373-374).

The Division of Jurors accepts for jury duty only such women as volunteer to serve (fols. 373-374).

The Division of Jurors makes a concerted effort to secure women volunteers from what the gentleman in charge of the Division described as "civic conscious" organizations, naming specifically the League of Women Voters (fols. 254-255).

When the prospective jurors to whom the notice has been sent arrives at the office of the Division of Jurors, he is given a questionnaire to fill out (fol. 257, Defendant's Exhibit D-1, fols. 3436-3438).

One of the questions on this form reads as follows (Defendant's Exhibit D-1, fol. 3438):

> "What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months)_____"

While this question obviously demands an answer, every person who answers it is for the reason of having answered it excluded from the special jury panel (fols. 282, 343-344, 349).

In this manner about 90% of all persons summoned for jury duty are excluded from special jury service (fol. 282).

After the prospective juror fills out his questionnaire, he takes it to one of the three examining clerks in the Division of Jurors (fol. 261), who accepts or rejects him for special jury duty, according to the "degree of intelligence as revealed by the questionnaire" (fols. 261-262).

The clerk then takes the accepted juror to one of the two Deputy County Clerks assigned to the Divi-

sion of Jurors, and while these officials may ask the juror further questions based on the questions in the questionnaire (fols. 288, 379-380), the examination is a cursory one inasmuch as these officials rely mainly on the opinion of the examining clerk (fol. 310).

In this manner a panel of about 3,000 special jurors was selected (fol. 247), as compared to the approximately 60,000 jurors on the general jury panel (fol. 246).

Of the approximately 3,000 members of the special jury panel, only 25-30 were women (fol. 337, Defendant's Exhibit D-2, fols. 3442-3444).

Evidence was presented at the trial showing that the special jury panel from which petitioner's jury was selected was composed primarily of bankers, manufacturers, executives, stock brokers, and the like, in number wholly out of proportion to their numerical significance in the community as a whole. Defendant's Exhibit D-2 (fols. 3442-3444) gives the occupational classification of the members of the special jury panel in New York County taken from information supplied by the members of the panel, and on file in the County Clerk's office (fols. 401-403, 407).

As stated, petitioner is a representative of a union of laboring men. Of the 89 talesmen examined on the *voir dire* at his trial, only three were members of a labor union. One of these was a member of a company union (fols. 526-527), who was peremptorily challenged by the People (fol. 558). Another was a member of the Apartment House and Superintendent Managers' Union (fol. 652); and he was likewise peremptorily challenged by the People (fol. 671). The other was a gentleman who had retired from the Treasury Department of Union Carbide and Carbon Corporation at the age of 69, had gone to work with Brooks Brothers

six months before the trial, and who on going with Brooks Brothers had become a member of a union, the name of which he did not know, and which he joined, so he testified, because Brooks Brothers had told him that "everybody had to belong to the union" (fols. 1369-1375). This juror was satisfactory to the People but was peremptorily challenged by the defense (fol. 1375).

Reasons for Granting the Writ.

The questions involved in this case are substantial. In *Smith* v. *Texas*, 311 U. S. 128 (1940), this Court stated, at 311 U. S. 130, that "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." The Court there held that discrimination against negroes by state officials in the selection of grand juries was, as to one who had been indicted by such a jury, a denial of basic rights protected by the Fourteenth Amendment to the Federal Constitution.

In *Glasser* v. *United States*, 315 U. S. 60 (1942), it appeared that Glasser, who had been convicted of a crime by a federal jury, claimed in an affidavit that there had been excluded from the jury panel all women except those who were members of the Illinois League of Women Voters. This Court held that if this charge could be proved there would be a showing that Glasser's rights under the Fifth and Sixth Amendments to the Federal Constitution had been impaired. This Court there (315 U. S. 86) reaffirmed the principle "that the proper functioning of the jury system, and, indeed, our democracy itself, re-

quires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class." The Court stated, further, that officials "must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community," and that "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted."

In *Thiel* v. *Southern Pacific Co.*, 90 L. Ed. Advance Opinions 922 (decided May 20, 1946), this Court reversed a civil judgment on the ground that there were excluded from the panel from which the jury was drawn all persons who worked for a daily wage. The Court again stated: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Smith v. Texas, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164; Glasser v. United States, 315 US 60, 85, 86 L ed 680, 707, 62 S Ct 457."

Such being the law, it is clear that the present case presents substantial constitutional questions.

I.

The virtual exclusion of women from jury service by deliberately failing to call them for jury duty and accepting only such women as happen to discover that they are eligible and appear to volunteer for duty certainly does not comport with the constitutional

requirement that a jury be "a body truly representative of the community."

In *United States* v. *Roemig,* 52 F. Supp. 857, the Federal District Court for the Northern District of Iowa, in a well-considered opinion, based on the decisions of this Court, quashed the indictment against the defendant, Louis Roemig, returned by a grand jury from which women were excluded although qualified to serve.

II.

While the Division of Jurors of New York County refuses to call women generally for jury duty, or notify women generally of their eligibility for jury duty, it makes a concerted effort to obtain volunteer women jurors from "civic conscious" organizations such as the League of Women Voters. The obvious effect of this discrimination is not only to minimize the representation of women on the jury panel but to assure that those women who do get on the panel are members of "civic conscious" organizations.

As stated in *Glasser* v. *United States,* 315 U. S. 60, 86:

> "The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a

bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

III.

Defendant's Exhibit D-2 (fols. 3442-3444) demonstrates strikingly that the great majority of the special jury panel from which petitioner's jury was drawn are members of the upper strata of economic and social society. The degree to which the panel is composed of bankers, manufacturers, executives, stock brokers, and the like, is, as stated, obviously wholly out of proportion to their numerical significance in the community as a whole, and the discrimination is so marked that it cannot have been the result of chance or accident (see *Smith* v. *Texas,* 311 U. S. 128, 131).

A jury panel so heavily weighed in favor of the economically and socially privileged and the interests of capital certainly does not comport with the idea of the jury as "a body truly representative of the community."

As stated by this Court in *Thiel* v. *Southern Pacific Co.,* 90 L. Ed. Advance Opinions 922, 924, 925:

"Recognition must be given to the fact that those eligible for jury service are to be found in every

stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

* * * *

"Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do."

Petitioner is a representative of a union of laboring men. The prejudice to him in trying him before a jury of the economically and socially privileged is manifest.

IV.

Apart from describing special juries, after careful study, as juries "prone to convict," The Judicial Council of the State of New York has stated that the special jury system is "distinctly un-American and not consonant with a trial by one's peers" (Reports

of The Judicial Council: Fourth Annual Report, pp. 46-48; Fifth Annual Report, p. 42; Sixth Annual Report, p. 197).

The evidence in the present case shows distinctly in what aspects the special jury here involved was un-American and unconstitutional. We quote again the admonition of the *Glasser* case (315 U. S. 60, 86):

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted."

It would be a pitiful understatement to claim that the selection of special jurors in New York County shows a "slight" tendency to select jurors by a method which fails to insure a trial by a representative group of the community. The evidence in this case demonstrates conclusively that the selection of special jurors in New York County results in a panel which fails in every respect to provide a body of jurors truly representative of the community. Accordingly, the trial of the petitioner before such a jury violated fundamental constitutional rights and privileges which it is incumbent upon this Court to preserve and enforce.

Conclusion.

For the foregoing reasons it is respectfully prayed that this petition for a writ of certiorari be granted, and that execution of the judgment appealed from be stayed pending its review by this Court.

Respectfully submitted,

ROBERT J. FITZSIMMONS,
Attorney for Petitioner.

HAROLD R. MEDINA,
Of Counsel.

APPENDIX.

Section 749-aa of the *Judiciary Law* of the State of New York

§ 749-aa. Special jurors in certain counties.

1. List of special jurors. The county clerk of each county of the state having a population of one million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them of the department in which such county is situated shall, from time to time direct. The names of the persons so selected liable to serve as special jurors shall be entered in suitable books alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside

an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy or secretary as to his qualification and fitness to serve as a special juror. Such county clerk may issue a subpoena requiring any person within such county to attend before him, his deputy or secretary at a time specified for the purpose of testifying concerning the qualification or fitness of himself or any other person to serve as a special juror, and the propriety of the selection of such special juror. A person so subpoenaed must attend and testify accordingly. In case of his failure to attend and testify as required by such subpoena, or a refusal to be sworn, or to answer any legal or pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. All of the provisions of sections four hundred four through four hundred fourteen of the civil practice act, sections twenty-five

and twenty-six of the civil rights law, are made applicable to the enforcement of the provisions of this subsection, except that no fees are required to be paid to any person so subpoenaed. The county clerk, in the record made by him of the jurors selected as such special jurors, shall enter the age of each special juror so selected, his business or vocation, if any, the length of his residence in the state and county and, if naturalized, the date of his naturalization. Such record shall be a public record and shall be open to inspection.

4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may

make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. The order must specify the time when the drawing of such special jury shall take place and the number of special jurors to be then drawn, the term of the court and particular day in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under sub-section six of this section, be at least five days in addition to any Sunday, holiday or half-holiday, after the day specified for the drawing of the special jury.

5. Drawing; notification of jurors. At the time specified in the order the special jury shall be drawn at the office of the county clerk as provided in section six hundred and two of this chapter. A minute of the drawing must be kept by the county clerk, or his deputy, which must be entitled in the action in which the jury is to serve specifying the term of court and the particular day in the term when the special jurors so drawn must attend; and there must be entered thereon the name of each juror drawn. Such minute must be signed by the judge or justice and by the county clerk, or his deputy, present at the drawing and such minute so signed must be filed in the office of such county clerk. Such county clerk must notify each juror therein named in the manner provided for trial jurors, except that provisions as to intervals of time with regard to the notification of trial jurors shall not apply. Before the day specified for the attendance of the special jurors the county clerk must file with the clerk of the trial court, part or term at which the juror is required to attend, a certified copy of the minute with a return indorsed thereon or annexed thereto specifying the manner in which each

juror was notified and the time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom such service shall have been made, stating the manner, time and place of such service shall accompany such return.

6. Additional jurors; drawing. If the panel of the special jurors thus drawn shall be exhausted before a jury is completed, or if the trial court shall be of the opinion that additional special jurors will probably be needed to complete the jury, the trial court may, from time to time, direct that such additional special jurors be drawn for the trial as it may deem expedient. The order must specify the number to be drawn, the time of the drawing and the time when such additional jurors shall be required and notified to attend. Such additional drawing shall be made by the same officers authorized to draw the special jurors, either in open court in the presence of the judge or justice presiding at the trial, or at the office of the county clerk as prescribed in such order, and shall be conducted in the same manner as the original drawing and a minute thereof kept and certified as prescribed for the original drawing, and the jurors so drawn shall be summoned in the same manner as those originally drawn.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the

formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore compiled, shall be the special jury list for such county subject to such revision thereof by striking therefrom and adding thereto the names of such jurors as from time to time the county clerk shall deem proper.

9. Appellate division to make rules. The justices of the appellate division of the supreme court of the department embracing the county in which such special jury list shall be constituted shall make such rules and regulations not inconsistent with the provisions of this section as shall be necessary to regulate the making of the application for a special jury under the provisions of this section for the drawing and attendance of such jurors and for the proper and efficient enforcement of the provisions of this section.

10. Violations of section or rules, penalty. Any violation of this section, or of such rules and regulations prescribed by the appellate division of the supreme court shall be deemed a contempt of court under section seven hundred fifty of the judiciary law and such rules and regulations may be enforced as if a violation thereof were such a contempt as provided by section seven hundred fifty-one of the judiciary law.

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Supreme Court, U. S.
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MAR 18 1917
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1916

Nos. 377, 452

JOSEPH S. FAY AND JAMES BOVE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF FOR PETITIONER JOSEPH S. FAY

ROBERT J. FITZSIMMONS,
Attorney for Petitioner Joseph S. Fay.

HAROLD R. MEDINA,
RICHARD T. DAVIS,
of Counsel.

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FOURTH POINT—Section 749-aa of the Judiciary Law of the State of New York is unconstitutional and void as applied to petitioner in that it denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution. This statute sets forth no standard to guide those charged with the selection of special jurors and therefore enables these officials to act arbitrarily, unreasonably, and capriciously in selecting special jurors. Furthermore, these officials in fact acted arbitrarily, unreasonably, and capriciously in selecting the special jury panel from which petitioner's jury was drawn 41

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Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 377, 452

JOSEPH S. FAY AND JAMES BOVE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF FOR PETITIONER JOSEPH S. FAY

I.

The Opinions of the Courts Below

The *per curiam* opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 521), is officially reported at 270 App. Div. 261, 59 N. Y. S. (2d) 127.

The Court of Appeals of the State of New York affirmed the judgment of the Appellate Division without opinion and its memorandum of the case is officially reported at 296 N. Y. 510. In this memorandum, as well as in its remittitur (R. 533-534), the Court of Appeals stated: "Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendants argued that the decision of the Trial Court in granting the motion of the People for a special

jury and in overruling the challenge of defendants to the special jury panel constituted a denial of due process and a violation of their rights under the Fourteenth Amendment of the Constitution of the United States. This Court held that the granting of the motion of the People for a special jury and the overruling of the challenge of the defendants to the special jury panel was not a denial of due process or a violation of defendants' rights under the Fourteenth Amendment to the Constitution of the United States."

II.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 *U. S. C. A.* § 344).

III.

Statement of the Case

A.

On May 17, 1943, an indictment (R. 4-13) was filed against the petitioner, Vice-President of the International Union of Operating Engineers (R. 15), and James Bove, Vice-President of the International Hod Carriers, Building and Common Laborers' Union of America, charging them with conspiracy to commit and with actual commission of the crime of extortion by obtaining sums of money from contractors engaged in the construction of the Delaware Water Supply Project in the State of New York through fear induced by threats to these contractors of unlawful injury to their property if the sums of money were not paid. The indictment contained one conspiracy count and six counts charging substantive offenses of extortion against six

different contractors. The indictment was filed in the Court of General Sessions for the County of New York, and upon petitioner's motion, the trial of the indictment was transferred to the Supreme Court of the State of New York (R. 19-20).

Petitioner and James Bove were tried before a court and a so-called "special" jury. They were found guilty of the crime of conspiracy as charged in count one of the indictment, and of the crime of extortion as charged in count seven; the jury found them not guilty on counts two, three, and five, and not guilty by direction of the Court on count four (R. 17, 494, 476-477). The jury was unable to reach a verdict with respect to count six (R. 17, 494).

On April 5, 1945, petitioner was sentenced upon the conspiracy count to a term of one year in the City Penitentiary, and fined $500.00; and, on the extortion count, to a term in the State Prison of not less than seven and one-half nor more than fifteen years, the sentences to be served consecutively (R. 18-19).

The questions here raised relate to the propriety, under the Fourteenth Amendment of the Federal Constitution, of trying petitioner by the special jury.

Section 749-aa of the *Judiciary Law* of the State of New York, which authorizes the County Clerk of New York County to empanel special jurors, is set forth in this brief as Appendix A.

Sections 590-608 of the *Judiciary Law* of the State of New York, the law relating to jurors generally in New York County, is set forth in this brief as Appendix B.

The rules of the Appellate Division, First and Second Departments, relating to the jury system in the City of New York (except those relating to the grand jury), and adopted pursuant to Section 592 of the *Judiciary Law*, are set forth in this brief as Appendix C.

Over petitioner's objection (R. 27-30), and on motion of the District Attorney for New York County (R. 21),

the Court ordered that petitioner be tried by a special jury (R. 30-31).

Petitioner thereupon challenged the special jury panel. This challenge is set forth in full at R. 32-34. It was there claimed, among other things, that Section 749-aa of the *Judiciary Law* was unconstitutional and void both on its face and as applied to petitioner in this case in that it violated the equal protection of the laws and due process of law clauses of the Fourteenth Amendment of the Federal Constitution. Specifically, petitioner contended that the special jurors had been selected with a purpose to exclude and discriminate against laborers, persons of humble station in life, and women, and with a purpose to obtain persons of conservative views, persons of the upper economic and social stratum in New York County, persons having a tendency to convict defendants accused of crime, and to exclude those who might understand the point of view of the laboring man. Petitioner contended, further, that Section 749-aa of the *Judiciary Law* vests in the County Clerk and his subordinates an unlimited and arbitrary discretion in the matter of selecting special jurors, and that in practice in this case these officials did act in an arbitrary and capricious manner.

Testimony was taken on the challenge to the special jury panel. The Court thereafter denied the challenge, to which petitioner's counsel excepted (R. 85). After the jury rendered its verdict, petitioner renewed his challenge to the special jury panel in support of his motion to set aside the verdict and in arrest of judgment (R. 503, 506), both of which were denied (R. 507).

Petitioner then appealed to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of conviction, and from each and every part thereof, and from each and every intermediate order therein (R. 2), thereby bringing up for review the order denying the challenge to the special jury panel (R. 1). While the

Federal questions here raised were fully argued before the Appellate Division, that Court said nothing about these questions in its *per curiam* opinion (R. 521-525), nor were they treated in the opinion of the dissenting justices (R. 526-529).

Petitioner then appealed to the Court of Appeals of the State of New York from every part of the judgment of the Appellate Division and appealed specifically, among other matters, from the order overruling his challenge to the special jury panel (R. 515-516). The Court of Appeals affirmed the judgment without opinion (296 N. Y. 510). In its memorandum and remittitur, however, it stated (*supra*, pp. 1-2) that it had considered and passed on petitioner's contentions involving the Fourteenth Amendment of the Federal Constitution.

B.

We turn now to the facts relating to the merits of petitioner's appeal.

While the panel of special jurors in New York County is separate and distinct from the panel of general jurors in the County (R. 40-41), both have their source in the list of persons who are called to come to the office of the Division of Jurors of New York County to be examined for general jury duty (R. 41).

The Division of Jurors obtains names of prospective jurors from the Federal census list, registration lists, tax lists, telephone directories, and the like (R. 42, 75).[1] Summonses are sent to persons whose names are thus obtained, requiring them to appear at the office of the Division of Jurors to be examined for jury duty (R. 43).

However, while women are equally eligible with men to serve on juries in the State of New York (*Judiciary Law*,

[1] This is governed by Section 594 of the *Judiciary Law*, see Appendix B herein, page 10.

§ 596, see Appendix B herein, pp. 10-11), and have been since September, 1937 (Laws of 1937, c. 513), the Division of Jurors never sends a notice to a woman to appear to be examined for jury duty (R. 75). It accepts for jury duty only such women as happen to learn of their privilege to serve on juries and who voluntarily come to the office of the Division of Jurors and ask to be considered for jury duty (R. 75).

The Division of Jurors makes a concerted effort, however, to secure such women volunteers from what the official in charge of the Division described as "civic conscious" organizations, such as the League of Women Voters (R. 43, 75). The officials of the Division of Jurors solicit lists of prospective women jurors from these "civic conscious" organizations and make speeches at meetings of these organizations urging the members to serve as jurors (R. 43).

When the prospective juror to whom the summons has been sent arrives at the office of the Division of Jurors, he is given a questionnaire to fill out (R. 43). This questionnaire is in evidence as Defendant's Exhibit D-1 (R. 508A-B, 42) and is substantially the same as that authorized by the rules of the Appellate Division (see Appendix C, pp. 30-35). The rules of the Appellate Division require that every person appearing for examination as a juror shall fill out, sign and swear to this questionnaire (see Appendix C, p. 19), and such is the practice (R. 43-44).

After the prospective juror fills out his questionnaire, he takes it to one of the three examining clerks in the Division of Jurors (R. 44), who, as required by law (*Judiciary Law*, § 595, Appendix B herein, p. 10, Rules of the Appellate Division, Appendix C herein, p. 20), personally interviews him, checks his police record, and accepts or rejects him for general jury duty on the basis of the questionnaire, the interview, and the police record.

The necessary qualifications of general trial jurors are set forth in Section 596 of the *Judiciary Law* (Appendix B

herein, pp. 10-11). To qualify as a juror a person must be an American citizen and a resident of the County; not less than 21 nor more than 70 years old; the owner, or the spouse of an owner, of property of the value of $250; in possession of his or her natural faculties and not infirm or decrepit; not convicted of a felony or a misdemeanor involving moral turpitude; intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

We come now to the manner of selecting special jurors from among those qualified to serve as general jurors.

There is no law or rule or regulation whatever to guide or govern the officials of the Division of Jurors in selecting special jurors. James McGurrin, the Deputy County Clerk in charge of the Division of Jurors, testified that "There are really no rules" (R. 41), and was emphatic that there was nothing whatever in the statutes relating to special jurors or in the rules laid down by the Appellate Division to govern or guide the Division of Jurors (R. 52).

However, by one simple expedient the officials in the Division of Jurors eliminate from special jury duty 90% of all persons summoned for jury duty.

The questionnaire previously referred to (Defendant's Exhibit D-1, R. 508A), contains the following question:

> "What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months)....."

While this question obviously demands an answer, every person who answers it is, without warning or notice, and for the reason alone of having answered it, excluded from the special jury panel (R. 49-50, 66-67).

In this manner about 90% of all persons summoned for jury duty are excluded from special jury service (R. 49-50, 57).

The persons who do not follow this seemingly mandatory direction to name two or more months are accepted

or rejected by the examining clerks for special jury duty, according to the testimony of the official in charge of the Division of Jurors, depending on the "degree of intelligence as revealed by the questionnaire" (R. 44-45).

Those persons whom the examining clerks accept as special jurors are, unlike those chosen for general jury duty, sent to see either Mr. McGurrin, the Deputy County Clerk in charge of the Division of Jurors, or Thomas F. Kane, a Deputy County Clerk assigned to the Division of Jurors (R. 50, 75). Mr. McGurrin testified that he gave the special juror only "a cursory examination," since he relied mainly on the way the examining clerk viewed the person (R. 57-58). However, he testified that he did inquire about the person's business experience and education (R. 51, 59).

As for Mr. Kane, Mr. McGurrin testified that he gave Mr. Kane no instructions, that "Mr. Kane is eminently qualified to act, without any instructions. He has had a lot of experience" (R. 52). Mr. Kane testified that he asked the special jurors the questions contained in the questionnaire (R. 76).

In this manner a panel of about 3,000 special jurors is maintained (R. 41, 74), as compared to the approximately 60,000 jurors on the general jury panel (R. 40, 74).[2]

Of the approximately 3,000 members of the special jury panel, only 25-30 are women (R. 65, Defendant's Exhibit D-2, R. 509, 83). About 7,000 of the 60,000 general jurors are women (R. 65).

The special jury panel thus selected, and from which petitioner's jury was drawn, is composed primarily of bankers, manufacturers, executives, stock brokers, and the

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[2] A "Comparative Statement of Activities", issued by the County Clerk, New York County (see *New York Law Journal*, August 15, 1946, page 1) shows that in the fiscal year 1944-1945, 197 persons qualified as special jurors, and that in the fiscal year 1945-1946, 108 persons so qualified.

like. Not a single laborer, or factory worker, or service employee has succeeded in finding a place on the special jury panel and the number of craftsmen and foremen included is nominal (Defendant's Exhibit D-2, R. 509).

While it needs no demonstration that there are in New York County (which is coextensive with the Borough of Manhattan, City of New York) many thousands of laborers, factory workers, service workers, and craftsmen and foremen, such fact is readily shown in the 1940 Federal Census of Population Report which classifies the occupations of all the residents of New York County who are employed, or, being experienced, are seeking work.

For the 1940 Census of Population Reports, the following classifications of occupations were used: (1) professional and semi-professional; (2) proprietors, managers and officials; (3) clerical, sales and kindred workers; (4) craftsmen, foremen and kindred workers;[3] (5) operatives

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[3] This category includes (see 1940 Census of Population, Volume II, part 1, p. 17):

Bakers; Blacksmiths, forgemen and hammermen; boilermakers; Brickmasons, stonemasons, and tile setters; Carpenters; Compositors and typesetters; Decorators and window dressers; Electricians; Foremen (not elsewhere classified); Inspectors (not elsewhere classified); Jewelers, watchmakers, goldsmiths, and silversmiths; Locomotive engineers; Locomotive firemen; Machinists, millwrights, and tool makers; Mechanics and repairmen; Molders, metal; Painters, construction and maintenance; Paperhangers; Pattern and model makers, except paper; Plasterers; Plumbers and gas and steam fitters; Roofers and slaters; Sawyers; Shoemakers and repairers (not in factory); Stationary engineers, cranemen, hoistmen, etc.; Tailors and tailoresses; Tinsmiths, coppersmiths, and sheet metal workers; Upholsterers; Cabinetmakers; Cement and concrete finishers; Electrotypers and stereotypers; Engravers (except photoengravers); Furriers; Glaziers; Heat treaters, annealers, and temperers; Inspectors, scalers, and graders, log and lumber; Loom fixers; Millers, grain, flour, feed, etc.; Opticians and lens grinders and polishers; Photoengravers and lithographers; Piano and organ tuners; Pressmen and plate printers, printing; Rollers and roll hands, metal; Stonecutters and stone carvers; Structural and ornamental metal workers.

and kindred workers;[4] (6) service workers;[5] (7) laborers, except farm; (8) farmers, farm managers, farm laborers.

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[4] This category includes (see 1940 Census of Population, Vol. II, part 1, p. 17):

Apprentices; Attendants, filling station, parking lot, garage, and airport; Brakemen, railroad; Chauffeurs and drivers, bus, taxi, truck, and tractor; Conductors, bus and street railway; Deliverymen; Dressmakers and seamstresses (not in factory); Filers, grinders, buffers, and polishers, metal; Firemen, except locomotive and fire department; Furnacemen, smeltermen, and pourers; Heaters, metal; Laundry operatives and laundresses, except private family; Linemen and servicemen, telegraph, telephone, and power; Meat cutters, except slaughter and packing house; Mine operatives and laborers; Motormen, street, subway, and elevated railway; Painters, except construction and maintenance; Sailors and deck hands, except U. S. Navy; Switchmen, railroad; Welders and flamecutters; Asbestos and insulation workers; Blasters and powdermen; Boatmen, canalmen, and lock keepers; Chainmen, rodmen, and axmen, surveying; Dyers; Fruit and vegetable graders and packers, except in cannery; Milliners (not in factory); Motion picture projectionists; Motormen (vehicle), mine, factory, logging camp, etc.; Oilers, machinery; Photographic process workers; Power station operators; Operatives and kindred workers (not elsewhere classified).

A large proportion of the "operatives and kindred workers" resident in Manhattan are to be found under "Operatives and kindred workers (not elsewhere classified)", which includes operatives engaged in industrial manufacturing. It appears, for example, that of the 128,253 employed "operatives and kindred workers" resident in Manhattan, 59,565 are employed in industrial manufacturing, 30,428 alone being engaged in the manufacture of apparel and other fabricated textile products. (see 1940 Census of Population, Vol. III, part 4, pp. 364-365).

[5] This category includes (see 1940 Census of Population, Vol. II, part 1, p. 17):

Service Workers, Except Domestic: Firemen, fire department; Guards, watchmen, and doorkeepers; Policemen and detectives; Soldiers, sailors, marines, and coast guards; Marshals and constables; Sheriffs and bailiffs; Watchmen (crossing) and bridge tenders; Barbers, beauticians, and manicurists; Bartenders; Boarding house and lodginghouse keepers; Charwomen and cleaners; Cooks, except private family; Elevator operators; Housekeepers, stewards, and hostesses, except private family; Janitors and sextons; Porters; Practical nurses and midwives; Servants, except private family; Waiters and waitresses, except private family; Attendants, hospital and other institution; Attendants, professional and personal service (not elsewhere classified); Attendants, recreation and amusement; Bootblacks; Ushers, amusement place or assembly.

Domestic Service Workers: Housekeepers, private family; Laundresses, private family; Servants, private family.

The Bureau of Labor Statistics of the United States Department of Labor, at the request of petitioner's attorneys, prepared the following table conforming the classifications of employment shown on Defendant's Exhibit D-2 (R. 509) to the Census classifications:

TABLE 1

NUMBER OF SPECIAL JURORS ON FILE IN NEW YORK COUNTY CLERK'S OFFICE, ACCORDING TO SURVEY ON JANUARY 31, 1945, GROUPED TO CORRESPOND AS WELL AS POSSIBLE WITH CLASSIFICATIONS OF THE 1940 CENSUS OF POPULATION.

Total number		2,911
Professional and semiprofessional workers		501
Architects and engineers	229	
Educators, teachers and librarians	27	
Newspaper men, editorial writers and others engaged in the dissemination of information	148	
Entertainers	26	
Chemists and physicists	66	
Attorneys	5	
Proprietors, managers, and officials, except farm		1,146
Manufacturers	106	
Executives, managers of industrial enterprises	470	
Retail merchants	144	
Building and construction superintendents	70	
Labor union representatives	1	
Bankers	170	
Stock brokers	185	

Clerical, sales and kindred workers		1,012
Insurance men*	166	
Real estate brokers*	117	
Salesmen, promoters of business enterprises and advertising men*	438	
Travel agency men	10	
Auditors and accountants	166	
Office clerks	94	
Civil service employees**	21	
Craftsmen, foremen and kindred workers		5
Mechanics	5	
Not in the labor force		82
Housewives	20	
Retired	62	
Unclassifiable		165***

* Some members of this group probably belong in the preceding classification, "Proprietors, managers and officials, except farm".

** Some members of this group undoubtedly belong elsewhere, as under service trades, or laborers.

*** There appears to be a mistake somewhere in the addition in "Defendants' Exhibit D-2". To obtain a correct total we have removed 3 from the "Unclassifiable" item.

The Bureau of Labor Statistics, at the request of petitioner's attorneys, also prepared a table comparing, by using the Census figures, the representation of the various occupational groups on the special jury panel with their numerical relation to the working resident population of New York County as a whole.

TABLE 2

Occupations of Employed Persons (Except on Public Emergency Work) and of Experienced Workers Seeking Work, Residing in Manhattan in the week of March 24 to 30, 1940, compared with Occupations of Special Jurors on File in New York County Clerk's Office, January 31, 1945.

Occupation	Experienced Labor Force [a]						Special Jurors
	Total			Males			
	Total	Employed [c]	Seeking work, experienced	Total	Employed [c]	Seeking work, experienced	
	A	B	C	D	E	F	G
Total [b]	921,183	778,202	142,981	589,431	489,618	99,813	2,664
ofessional and semiprofessional	111,600	98,343	13,257	61,191	53,416	7,775	501
oprietors, managers and officials	85,969	81,234	4,735	73,732	69,509	4,223	1,146
rical, sales and kindred workers	196,037	169,066	26,971	112,316	95,853	16,463	1,012
aftsmen, foremen and kindred workers	70,497	54,217	16,280	67,504	51,618	15,886	5
eratives and kindred workers	156,581	128,253	28,328	98,493	79,562	18,931	.....
vice workers	254,595	216,992	37,603	131,112	110,157	20,955	.....
orers, except farm	45,375	29,869	15,506	44,578	29,293	15,285	.....
rmers, farm managers, farm laborers	529	228	301	505	210	295	.....
	Percent			Percent			
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0
ofessional and semiprofessional	12.1	12.6	9.3	10.4	10.9	7.8	18.8
oprietors, managers and officials	9.3	10.4	3.3	12.5	14.2	4.2	43.0
rical, sales and kindred workers	21.3	21.7	18.9	19.1	19.6	16.5	38.0
aftsmen, foremen and kindred workers	7.7	7.0	11.4	11.4	10.5	15.9	0.2
eratives and kindred workers	17.0	16.5	19.8	16.7	16.2	19.0	.....
vice workers	27.6	27.9	26.3	22.2	22.5	21.0	.....
orers, except farm	4.9	3.8	10.8	7.6	6.0	15.3	.....
rmers, farm managers, farm laborers	0.1	[d]	0.2	0.1	[d]	0.3	.....

[a] Includes the employed (except those on public emergency work) and experienced workers seeking work. Source: U. S. Bureau of the Census. Sixteenth Census of the United States, 1940, Population, v. III, part 4, New York State Table 10a, pp. 363-365.

[b] Omitting the unclassified, as well as housewives, retired persons, and others not in the labor force.

[c] Except on public emergency work.

[d] Less than one-tenth of one percent.

This table shows that whereas 17% of the total experienced labor force, and 16.7% of the total male experienced labor force, resident in New York County (Manhattan), are "operatives and kindred workers," not one person on the special jury panel belonged to this classification.

The table shows that whereas 27.6% of the total experienced labor force, and 22.2% of the total male experienced labor force, resident in New York County, are "service workers," not a single person on the special jury panel belonged to this classification.

The table shows that while 4.9% of the total experienced labor force, and 7.6% of the total male experienced labor force, resident in New York County, are "laborers, except farm," not one such person was on the special jury panel.

In other words, 49.5% of the total experienced labor force, and 46.5% of the total male experienced labor force, resident in New York County, were totally excluded from the special jury panel.

Moreover, while 7.7% of the total experienced labor force, and 11.4% of the total male experienced labor force, resident in New York County, are craftsmen, foremen, and kindred workers, only 2/10ths of 1% of the special jury panel was so composed.

As against the exclusion of these groups, the special jury panel is overloaded with proprietors, managers and officials. While this group constitutes only 9.3% of the total experienced labor force, and 12.5% of the total male experienced labor force, resident in New York County, it comprises 43% of the special jury panel.

Of the 89 talesmen examined on the *voir dire* at petitioner's trial, only three were members of a labor union. One of these was a member of a company union (R. 114), who was peremptorily challenged by the People (R. 123). Another was a member of the Apartment House and Superintendent Managers' Union (R. 150); and he was likewise peremptorily challenged by the People (R. 155). The other was a gentleman who had retired from the Treasury Department of Union Carbide and Carbon Corporation

at the age of 69, had gone to work with Brooks Brothers six months before the trial, and who on going with Brooks Brothers had become a member of a union, the name of which he did not know, and which he joined, so he testified, because Brooks Brothers had told him that "everybody had to belong to the union" (R. 353-354). This juror was satisfactory to the People but was peremptorily challenged by the defense (R. 355).

IV.

Specification of Errors

The trial court erred in denying petitioner's challenge to the special jury panel inasmuch as:

1. The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, and service employees were systematically, intentionally, and deliberately excluded as such denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

2. The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, and service employees were systematically, intentionally, and deliberately excluded as such denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

3. The trial of petitioner by a jury selected from a panel from which women were systematically, intentionally, and deliberately excluded as such denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

4. The trial of petitioner by a jury selected from a panel from which women were systematically, intentionally, and deliberately excluded as such denied petitioner the due

process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

5. The trial of petitioner by a jury selected from a panel from which women who were not members of so-called "civic conscious" organizations were systematically, intentionally, and deliberately excluded as such denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

6. The trial of petitioner by a jury selected from a panel from which women who were not members of so-called "civic conscious" organizations were systematically, intentionally, and deliberately excluded as such denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

7. The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, service employees, and also women, particularly those not members of so-called "civic conscious" organizations, were systematically, intentionally, and deliberately excluded as such denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

8. The trial of petitioner by the special jury as distinguished from a general, or ordinary jury, denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution, and the statute authorizing the empanelling of special juries (*Judiciary Law*, § 749-aa) is accordingly unconstitutional and void as applied to him.

9. Section 749-aa of the *Judiciary Law* of the State of New York is unconstitutional and void in that it sets forth no standards to guide those charged with the selection of members of the special jury panel and accordingly denies petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

10. Section 749-aa of the *Judiciary Law* of the State of New York is unconstitutional and void as applied to petitioner in that the manner in which members of the special jury panel were selected was unreasonable, arbitrary, and capricious, and denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

V.

ARGUMENT.

FIRST POINT

The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, service employees, and also women, particularly those not members of so-called "civic-conscious" organizations, were systematically, intentionally, and deliberately excluded as such, denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

This Court has many times held[6] that the deliberate and intentional exclusion of Negroes from trial juries or grand juries, whether by state statute or by action of state officials, violated the equal protection clause of the Fourteenth Amendment.

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[6] *Strauder* v. *West Virginia*, 100 US 303, 25 L ed 664 (1879); *Neal* v. *Delaware*, 103 US 370, 26 L ed 567 (1880); *Carter* v. *Texas*, 177 US 442, 44 L ed 839, 20 S Ct 687 (1900); *Rogers* v. *Alabama*, 192 US 226, 48 L ed 417, 24 S Ct 257 (1904); *Norris* v. *Alabama*, 294 US 587, 79 L ed 1074, 55 S Ct 579 (1935); *Hollins* v. *Oklahoma*, 295 US 394, 79 L ed 1500, 55 S Ct 784 (1935); *Hale* v. *Kentucky*, 303 US 613, 82 L ed 1050, 58 S Ct 753 (1938); *Pierre* v. *Louisiana*, 306 US 354, 83 L ed 757, 58 S Ct 536 (1939); *Smith* v. *Texas*, 311 US 128, 85 L ed 84, 61 S. Ct 164 (1940); *Hill* v. *Texas*, 316 US 400, 86 L ed 1559, 62 S Ct 1159 (1942).

There can be no doubt that the intentional exclusion of any person or group of persons from jury service on some ground which has no relation to their qualifications to serve as jurors raises a question under the equal protection clause whether the exclusion be based on race, sex, nationality, political, religious, economic, or social belief or position, or any other distinguishable characteristic.

Yick Wo v. *Hopkins*, 118 US 356, 30 L ed 220, 6 S Ct 1064 (1886).

Skinner v. *Oklahoma*, 316 US 535, 86 L ed 1655, 62 S Ct 1110 (1942).

See *American Sugar Refining Co.* v. *Louisiana*, 179 US 89, 92, 45 L ed 102, 103-104, 21 S Ct 43, 44-45 (1900).

It has been held to be a denial of the equal protection of the laws under the Fourteenth Amendment intentionally to exclude from a jury: members of a particular political party, *Commonwealth of Kentucky* v. *Powers*, 139 Fed 452 (C.C., E.D. Ky., 1905), reversed on other grounds, 201 US 1, 50 L ed 633, 26 S Ct 387 (1906); members of the Roman Catholic faith, *Juarez* v. *State*, 102 Tex. Cr. 297, 277 S. W. 1091 (Ct. of Crim. Appeals, Tex., 1925); and the same has been assumed in cases involving the exclusion of Mexicans,[7] Italians,[8] and wage-earning laborers.[9]

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[7] *Ramirez* v. *State*, 119 Tex. Crim. Rep. 362, 40 S. W. (2d) 138 (Ct. of Crim. App., Tex., 1931), cert. den., 284 US 659, 76 L ed 558, 52 S Ct 36 (1931); *Mirca* v. *Territory*, 13 N. M. 192, 81 P. 586 (Sup. Ct., N. M., 1905); *Carrasco* v. *State*, 130 Tex. Crim. Rep. 659, 95 S. W. (2d) 433 (Ct. of Crim. App., Tex., 1936), *contra*: *Sanchez* v. *State*, 181 S. W. (2d) 87 (Ct. of Crim. App., Tex., 1944), criticized in 23 Texas L. Rev. 78 (1944).

[8] *State* v. *Guirlando*, 152 La. 570, 93 So. 796 (Sup. Ct., La., 1922).

[9] *Mamaux* v. *U. S.*, 264 Fed 816 (C.C.A., 6th, 1920).

A.

There were completely and absolutely excluded from the panel from which petitioner's jury was chosen all laborers, operatives, service employees, and virtually all craftsmen, and foremen.

This exclusion was systematic, intentional, and deliberate. The officials of the Division of Jurors denied this, as such officials uniformly do in these cases. They claimed that persons were accepted or rejected for jury duty depending upon the "degree of intelligence as revealed by the questionnaire." In the very nature of things this cannot be the fact. It just cannot be that *not one* of the working people excluded, albeit of humble station in life, did not have sufficient intelligence "as revealed by the questionnaire" to qualify for special jury duty. Intelligence is by statute (*Judiciary Law*, § 596, Appendix B herein, pp. 10-11) a necessary qualification for a general juror, and there is no indication whatever that these people are excluded from general jury duty. Moreover there is certainly nothing in the questionnaire, or in the interview consisting only of a re-asking of the question on the questionnaire, to give any basis for a sifting of the superior intelligent from those who are just plain intelligent.

The total exclusion of these working people of humble station; the special attention which the Division of Jurors gives to the question of occupation, it being one of the few facts of which it makes official note on the questionnaire (R. 508A); the fact that prospective special jurors are questioned about their business experience; the circumstance that there are excluded all those less sophisticated persons who take seriously the mandatory direction to name preferred months of service—point irresistibly to the conclusion that the discrimination is intentional. As stated in *Lane* v. *Wilson*, 307 US 268, 275, 83 L ed 1281, 1287, 59 S Ct 872, 876 (1939): "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." As

stated in *Smith* v. *Texas*, 311 US 128, 132, 85 L ed 84, 87, 61 S Ct 164, 166 (1940): "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." It is impossible that "chance and accident alone" could have brought about the exclusion of laborers, operatives, service employees, craftsmen, and foremen. See *Smith* v. *Texas*, *supra*, at 311 US 131, 85 L ed 87, 61 S Ct 166.

B.

The large portion of women in New York County are effectively and intentionally excluded from jury service. While women are equally eligible with men to serve on juries in New York, the Division of Jurors summons only men to appear to be examined for jury duty. This discriminatory refusal to notify women of their right to serve on juries and to put in force on their behalf the machinery by which that right can be exercised, has the effect of excluding from jury service the bulk of the women in New York County qualified for such service.

This discrimination can be nothing but intentional. The officials in charge of the Division of Jurors gave as the reason for the practice the fact that women have a statutory exemption from jury service if they choose to exercise it. Even if the assigned reason were, contrary to established fact, the real reason, it would be no answer to the charge of intentional exclusion of women as such. The Division of Jurors must realize that many women would choose not to claim an exemption, and that the failure to summon these women excludes them from jury service. The officials of the Division of Jurors must intend the inevitable consequence of their failure to summon these women.

If the exclusion of women were not deliberate, it is not understandable why the Division of Jurors did not adopt the simple procedure of sending summonses to women as well as men, and inquiring, when the women came to be

examined pursuant to the summons, whether they would claim exemption from service. This is a manner in which the law contemplates that a woman shall exercise her right of exemption (*Judiciary Law*, § 600, Appendix B herein, p. 14), and the questionnaire has space specifically designated for the claiming of exemption (Defendant's Exhibit D-1, R. 508B).

An analogous situation was revealed in *Thiel* v. *Southern Pacific Co.*, 90 L ed Advance Opinions 922 (decided May 20, 1946), where this Court reversed a judgment on the ground of the exclusion from the jury of those working for a daily wage. The Court there stated, at pp. 925-926:

> "It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of $4 a day. All were systematically and automatically excluded."

The evidence shows, furthermore, that the intentional discrimination against women as such is intensified when the selection of special jurors is made. While some 7,000, or 11%, of the 60,000 general jurors are women, only 25 to 30 of the 3,000 special jurors, or 8/10ths of 1% to 1%, are women. It cannot be that no more than 25 or 30 women of the 7,000 women on the general jury panel did not have sufficient intelligence "as revealed by the questionnaire" to qualify for special jury duty. As stated, intelligence is a statutory requirement of general jurors (*Judiciary Law*, § 596, Appendix B herein, pp. 10-11).

C.

The deliberate solicitation of women jurors from the membership of "civic conscious" women's organizations, coupled with the failure to send summonses to women generally to appear to be examined for jury duty, is, of course, discrimination against women who are not members of "civic conscious" organizations.

No reason was given by the officials of the Division of Jurors for thus favoring members of "civic conscious" organizations other than the very fact of membership in such organizations. Accordingly it is clear that non-members of such organizations were discriminated against as such.

D.

There can be no doubt that petitioner, a labor union official, was aggrieved by the exclusion of laborers, operatives, service employees, craftsmen, and foremen, those groups which form the bulk of labor union membership and which alone include the kind of people with whom and for whom petitioner has worked.

As this Court stated in *Glasser* v. *United States,* 315 US 60, 85-86, 86 L ed 680, 707, 62 S Ct 457, 472 (1942), with reference to the selection of jurors in the Federal courts: "And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class." The absolute favoritism shown to bankers, manufacturers, stock brokers, and the like, in the selection of the special jury panel in New York County, has made that jury the organ of the social and economic class which these men represent. The trial of a labor union official before such a jury is a travesty of justice.

Nor can it be doubted that petitioner was aggrieved by the substantial exclusion of all women who were not members of "civic conscious" organizations. In *Glasser* v. *United States, supra,* the petitioner claimed that the women on the panel from which his jury was selected were taken from a list furnished by the Illinois League of Women Voters and prepared exclusively from its membership. This Court, holding that proof of this claim would require reversal of the judgment, stated (315 US 60, 86, 86 L ed 680, 707-708, 62 S Ct 457, 472):

> "The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

Whether petitioner, a male, has standing under the equal protection clause of the Fourteenth Amendment to complain of the intentional exclusion of women as such from the panel from which his jury was selected presents sharply a fundamental question concerning the application of the constitutional provision in matters of judicial procedure.

Petitioner is not a member of this excluded class, nor has he proved that he was actually prejudiced by the exclusion of women as such. However, petitioner submits that this is immaterial, and that the proof that he was found guilty by a jury selected from a panel from which women were intentionally excluded requires reversal of the judgment against him on the basis of the equal protection clause of the Fourteenth Amendment.

This Court has many times reversed convictions of Negroes tried by juries from which Negroes were deliberately excluded. This Court held in these cases that the equal protection clause of the Fourteenth Amendment entitled these defendants to the chance, unaffected by any element of deliberate discrimination, of having Negroes on the jury which tries them. The basis of these decisions was certainly not any proof that juries of which Negroes had a chance of becoming members would have decided the case differently than did the jury whose verdict was before the Court. Rather, the basis of these decisions, as stated in *Smith* v. *Texas*, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164, 165, is that "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community", and that for "discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government". In other words, what is crucial is that there shall have been such discrimination as tends to make the jury a body not truly representative of the community. The principle is not that the jury should represent the defendant, but rather the community; and a jury from which women are intentionally excluded does not represent the community.

Where as a matter of substantive law state action arbitrarily discriminates against one class or group of persons it is obviously necessary that one who would complain that he has been denied the equal protection of the laws thereby must show that he is a member of the class or group discriminated against. Otherwise, it is self-evident and demonstrable that he has sustained no personal injury. But it is otherwise where the composition of the jury panel is involved. No one can prove by legal evidence how the inclusion on the panel of classes or groups actually excluded would have affected the result of the trial. To require one convicted by a jury from which

substantial segments of the community were excluded to prove that he was a member of the class excluded or actually prejudiced thereby would open the door to the most insidious discriminations, indirect but no less real.

As this Court recently stated in *Ballard* v. *United States*, CCH U. S. Sup. Ct. Bulletin, Vol. 7, pp. 205, 210, in dismissing an indictment against a woman and her son, returned by a grand jury and tried by a trial jury from which women were intentionally excluded:

> "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

As the Court stated in *United States* v. *Roemig*, 52 F. Supp. 857, 862 (D. C., N. D. Iowa, 1943), in rejecting the conclusion that a man could not complain of the exclusion of women from the jury:

> "Such a conclusion must rest upon the premise that in the administration of criminal justice each sex may logically be expected to deal more charitably and tolerantly with its own members than with those of the opposite sex. The presumption urged is not inevitable; indeed, it may be argued upon many concrete precedents, some ancient, others very modern, to be quite unfounded. Here again, instead of resting upon an hypothesis that is historically and psychologically dubious, one would seem to be on firmer ground who inquires simply whether the defendant has been indicted by a grand jury selected as he had the right under the law to expect and require it to be selected. That inquiry answered negatively, the indictment ought to fail, without requiring the doubtfully possible proof of concrete injury to the moving defendant."

The cases involving claims of denial of procedural due process provide an apt analogy. In such cases this Court has time and time again rejected the contention that the claimant must show actual prejudice. *Tumey* v. *Ohio*, 273 US 510, 535, 71 L ed 749, 759, 47 S Ct 437, 435 (1926); *Patton* v. *United States*, 281 US 276, 292, 74 L ed 854, 860, 50 S Ct 253, 256 (1930); *Glasser* v. *United States*, 315 US 60, 75-76, 86 L ed 680, 702, 62 S Ct 457, 467 (1942); *Lyons* v. *Oklahoma*, 322 US 596, 597, 88 L ed 1481, 1483, 64 S Ct 1208, 1210 (1944); *Malinski* v. *New York*, 324 US 401, 404, 89 L ed 1029, 1032, 65 S Ct 781, 783 (1945).

SECOND POINT

Section 749-aa of the Judiciary Law of the State of New York is unconstitutional and void as applied to petitioner in that it deprived petitioner of the equal protection of the laws in contravention of the Fourteenth Amendment of the Federal Constitution. By being tried by the special jury pursuant to the provisions of this statute, petitioner was, without justification, and to his prejudice, treated differently than other defendants in criminal cases who are tried by a general or ordinary jury.

In being forced to go to trial before the special jury by virtue of the provisions of Section 749-aa of the *Judiciary Law*, petitioner was treated differently than other defendants in criminal cases in the New York courts who are tried by a general jury. If, as petitioner asserts, there was no rational basis for his being tried before the special jury as distinguished from a general jury, then it is clear that petitioner was denied the equal protection of the laws and that the statute referred to (*Judiciary Law*, § 749-aa) is unconstitutional and void as applied to him.

The special jury panel differs radically from the general jury panel in New York County. While the defect of discrimination against women, particularly those who are not

members of so-called "civic conscious" organizations, permeates both the general and special juries, there is no evidence whatever that laborers, operatives, service employees, craftsmen, and foremen, are excluded from the general jury panel. To the contrary, the evidence indicates that men are summoned to be examined for jury duty without regard to occupational, social, or economic status, and that anyone thus summoned who evidences the qualifications required by law is admitted to general jury duty. The evidence shows that the exclusion of laborers, operatives, service employees, craftsmen, and foremen, occurs as a result of the exercise of the uncontrolled discretion vested in the officials of the Division of Jurors to select, from those qualified for general jury duty, persons to serve on the special jury panel.

Moreover, the evidence shows that while women are discriminated against in the empanelling of the general jury, that discrimination is intensified in selecting the special jurors. While 11% of the general jurors are women, only 1%, at most, of the special jurors are women.

There is a further and distinct respect in which the special jury differs vitally from the general jury. *It is a matter of official record that special juries in the State of New York are much more prone to convict defendants in criminal cases than are general juries.* The Judicial Council of the State of New York has so found.

A word first about the Judicial Council. This public body was established by statute in 1934 to make continuous study and survey of all matters relating to judicial organization and procedure, and to make reports and recommendations to the Legislature, and to the courts, of such changes therein which would improve the administration of justice (*Judiciary Law*, §§ 40-48).

The membership of the Judicial Council consists, by law, of the chief judge of the Court of Appeals, the presiding justices of each Appellate Division of the Supreme Court, the members of the Legislature serving as chairmen or ranking minority members of various specified legislative

committees having to do with judicial organization and procedure, a member of the bar from each judicial department in the State, and two citizens of the State at large (*Judiciary Law*, § 40).

In its *Fourth Annual Report* (Legislative Document No. 48, 1938), the Judicial Council stated (pp. 46-47):

> "A more serious charge than its uselessness has been levelled at the special jury. It has been suggested that, by a process of eliminating jurors who have previously served on a special jury which has ended in acquittal or disagreement, special juries are particularly chosen to be convicting juries. Data gathered by the Judicial Council on the use of special juries during the five-year period July 1, 1932 to June 30, 1937, in the counties of New York, Bronx, Kings and Queens, indicate that special juries are prone to convict. During the period studied, of 383 defendants tried before special juries, 78 per cent were convicted and 22 per cent were acquitted. It should be noted that in the 383 cases, only five defendants demanded a special jury. In all other cases, the application was made by the people.
>
> To compare the special with the ordinary juries, a study was made of all homicide cases, except those involving negligence or automobiles, tried during 1933 and 1934. The percentage of convictions to acquittals was much higher in cases tried by special juries than in cases tried by ordinary juries. During the calendar year 1933, of the 47 defendants tried for homicide before special juries 83 percent were convicted and 17 percent were acquitted. During the same period, of 156 defendants tried for offenses of the same grade by ordinary juries, 43 percent were convicted and 57 percent were acquitted. In 1934, of 72 defendants tried before special juries, 82 percent were convicted and 18 percent were acquitted, while of 191 defendants tried by ordinary juries, 37 percent were convicted and 63 percent were acquitted (see Table II below).
>
> It is significant also that the percentage of defendants pleading guilty to a lesser offense was much higher in cases to be tried before special juries than those to be tried by ordinary juries. In 1933, for

example, 26 percent of 47 defendants to be tried before special juries and only 9 percent of the 156 defendants to be tried before ordinary juries pleaded guilty to a lesser offense. In 1934, 39 percent of 72 defendants and 2 percent of 191 defendants to be tried before special and ordinary juries respectively, pleaded guilty to lesser offenses. Thus, defendants to be tried before special juries seem to realize that their chances of complete acquittal are much less than if they were to be tried before ordinary juries." [10]

There can be no doubt then that petitioner was gravely prejudiced in being tried by a special jury as distinguished from a general jury: in the first place, because the general jury is more truly representative of the community than is the special jury; in the second place, because the special jury is much more prone to convict defendants in criminal cases than is the general jury. Actually, however, the question of prejudice is immaterial since it is clear that this Court will not impose on petitioner the burden of showing actual prejudice where there has been a departure from the constitutional norm (equal treatment of those similarly situated) in a matter of trial procedure (see cases cited *supra*, p. 26, relating to prejudice in denial of procedural due process).

The only remaining question is whether there is any justification for empanelling special juries as distinguished from general juries in the State of New York.

It is absolutely clear and certain that there is not. Section 749-aa of the *Judiciary Law* sets forth no standard for the selection of special jurors which is not, as shown by the evidence, applicable in the selection of general jurors; and apart from the insidious practice of eliminating from special jury duty all those who follow the mandatory direction to name preferred months of service, the *stand-*

[10] There follows in the *Report* (pp. 47-48) tables of data from which the above information was taken. These tables are set forth in this brief in Appendix D, page 45. We have printed as Appendix D to this brief all the material in the official reports of the Judicial Council dealing with the special jury.

ard which the officials of the Division of Jurors stated they used to select special jurors is, by law, also a standard governing the selection of general jurors. Time and time again these officials testified that intelligence was the requisite qualification for special jury duty (R. 44-45, 46, 49, 51, 75, 80-81). But one must also be intelligent to qualify as a general juror (*Judiciary Law*, § 596, Appendix B herein, pp. 10-11).

In its *Third* (1937), *Fourth* (1938), *Fifth* (1939), and *Sixth* (1940) *Annual Reports* (see Appendix D herein, pp. 36-47), the Judicial Council not only condemned the special juries in New York as un-American, but pointed out that they were unnecessary since the qualifications prescribed by law were substantially the same for both the general and special juror.

In 1940, the method of general jury selection in New York City was changed by statute in accordance with the recommendations of the Judicial Council. After this change, the Judicial Council stated even more forcefully its previous finding that special juries were unnecessary. In its *Eighth Annual Report* (Legislative Document No. 48, 1942, pp. 39-41), the Judicial Council stated:

> "Since 1937 the Judicial Council has been recommending the abolition of special juries as undesirable and un-American. (Third Report, pp. 34, 121-128; Fourth Report, pp. 46-48; Fifth Report, p. 42). In 1941 the Legislature by Chapter 402, abolished special juries in the counties of Westchester—population 569,122—and Nassau—population 404,888—(see *supra*, page 24). Thus, special juries at present exist only in the counties of New York, Bronx, Kings and Queens. In its Fourth Annual Report the Council stated (page 47):
>
> > 'The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases.'

The goal of a higher calibre of jurors *has now been achieved* under the new method of jury selection for the city of New York which went into effect September 1, 1940 upon recommendation of the Judicial Council and which now applies to *all* jurors those high standards which formerly were required only of special jurors.

The Judicial Council therefore again renews its recommendation for the abolition of special juries because:

a. The need in certain cases for better jurors was in the past the only valid objection to the abolition of special jurors. This objection, as stated above, has now been entirely overcome.

b. The undesirable features of a special jury are still present.

Some opponents of the Council's recommendation have now conceded that the Council's position is well taken. The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York in its 1940 Reports, Memo No. 65, page 169, withdrew its former opposition and stated:

'In a previous report . . . this committee disapproved a bill (S.P. 180, . . . ; A. Pr. 210, Int. . . .) seeking to abolish the blue ribbon jury. The basis of this action was that the reform of the methods of selecting jurors is a prerequisite to the elimination of the blue ribbon system. The enactment of the bill under consideration [putting into effect the new jury system] would satisfy this condition and would eliminate the chief basis of the committee's action with regard to S. Pr. 180, A. Pr. 210. In such event, the committee would approve S. Pr. 180, A. Pr. 210.'

Similarly, some of the officials most directly concerned had conceded that objection to the abolition of special juries would be met if all jurors were selected according to the provisions of the Judiciary Law with attention to the qualifications and disqualifications as therein set forth.

Not only is this now the case but the requirements for an acceptable juror have been made much more

stringent than heretofore. Each prospective juror is searchingly examined and his qualifications carefully checked. The new system of jury selection is based on the best businesslike and up-to-date administrative methods.

The Judicial Council has been advised by the four county clerks of the counties concerned that all jurors now serving and available for service have been qualified and examined under the new system. The Council has further been informed by the county clerks, as well as by others in a position to know, that the calibre of general jurors has greatly improved since the establishment of the new system.

Special juries are now practically confined to the trial of murder charges. From July 1, 1932 to June 30, 1941 every application for a special jury was made by the people.

It has been said that the abolition of special juries will result in too great a loss of time at the trial of actions where the crime charged is punishable by death, by reason of the possible drawing of jurors opposed to capital punishment. This matter, however, has been taken into account under the revised jury system in section 597 of the Judiciary Law which reads as follows:

> '§ 597. Juror with scruples against death penalty. No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of murder in the first degree. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.' (Added L. 1940, ch. 202, effective Sept. 1, 1940.)

This section applies to all trial and grand jurors throughout New York City and was included specifically to save time in the examination of jurors by attorneys. It has proven successful in Richmond County, which has no special jurors."

The trial of petitioner by a special jury as distinguished from a general jury denied him the equal protection of the laws in violation of the Fourteenth Amendment.

THIRD POINT

The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, service employees, and also women, particularly those not members of so-called "civic conscious" organizations, were systematically, intentionally and deliberately excluded, deprived petitioner of due process of law in contravention of the Fourteenth Amendment.

In *Hebert* v. *Louisiana*, 272 US 312, 316, 71 L ed 270, 273, 47 S Ct 103, 104 (1926); this Court stated:

> "What it [the due process of law clause in the Fourteenth Amendment] does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

This statement of the requirements of due process has often been adopted by this Court in cases involving procedural due process. *Powell* v. *Alabama*, 287 US 45, 67, 77 L ed 158, 169, 53 S Ct 55, 63 (1932); *Mooney* v. *Holohan*, 294 US 103, 112, 79 L ed 791, 794, 55 S Ct 340, 342 (1935); *Brown* v. *Mississippi*, 297 US 278, 286, 80 L ed 682, 687, 56 S Ct 461, 465 (1936); *Palko* v. *Connecticut*, 302 US 319, 328, 82 L ed 288, 293, 58 S Ct 149, 153 (1937).

Petitioner submits that his trial and conviction for a serious criminal offense by a jury selected from a panel from which were intentionally excluded as such, laborers, operatives, service employees, craftsmen, and foremen, and women, particularly those not members of so-called "civic conscious" organizations, was inconsistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

Petitioner is aware that the State of New York is free to regulate the procedure of its courts in accordance with its own conceptions of policy, and that in doing so it may abolish trial by jury. *Walker* v. *Sauvinet*, 92 US 90, 23 L ed 678 (1875); *Maxwell* v. *Dow*, 176 US 581, 44 L ed 597, 20 S Ct 448 (1900); *Hurtado* v. *California*, 110 US 516, 28 L ed 232, 4 S Ct 111, 292 (1884).

However, as stated in *Brown* v. *Mississippi*, 297 US 278, 285, 80 L ed 682, 687, 56 S Ct 461, 465 (1936):

> "But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal."

There are in this country two traditional methods of trial, one, by a judge or judges, whatever may be their official title, the other, by a judge and a jury. It is settled that where one is tried by a judge, he is entitled as a matter of due process of law to a basically impartial judge. *Tumey* v. *Ohio*, 273 US 510, 71 L ed 749, 47 S Ct 437, 50 A.L.R. 1243 (1926). It is petitioner's assertion that where one is tried by a judge and a jury, he is entitled as a matter of due process of law to a jury which is basically impartial, to a jury from which substantial segments of the community, otherwise able to meet relevant and permissible qualifications established by law, have not been intentionally excluded.

The decisions of this Court have recognized that a jury "truly representative of the community" is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

In *Smith* v. *Texas*, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164, 165 (1940), a case involving discrimination against Negroes in the selection of a grand jury, it was stated:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be

a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

In *Glasser* v. *United States*, 315 US 60, 86, 86 L ed 680, 707-708, 62 S Ct 457, 472 (1942), a case involving the alleged exclusion from jury service of women who were not members of the League of Women Voters, this Court stated, with reference to the duty of selecting federal jurors:

> "And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.
>
> The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition,

it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

In *Thiel* v. *Southern Pacific Co.*, 90 L ed Advance Opinions 922, 924-925 (decided May 20, 1946), reversing a civil judgment based on a verdict rendered by a jury from which persons working for a daily wage were excluded, this Court stated:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Smith v. Texas, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164; Glasser v. United States, 315 US 60, 85, 86 L ed 680, 707, 62 S Ct 457. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideal of trial by jury."

* * * * * * *

"Moreover, the general principles underlying proper jury selection clearly outlaw the exclusion practiced in this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay-period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very sub-

> stantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do."

In *Ballard* v. *United States,* CCH US Sup. Ct. Bulletin, Vol. 7, page 205 (decided December 9, 1946), this Court dismissed an indictment returned by a grand jury and tried by a trial jury from which women were intentionally excluded. The Court reiterated the principle that it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community, and stated:

> "The exclusion of one [sex] may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

Thus, this Court has not only recognized that "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community" (*Smith* v. *Texas, supra*), but has condemned the very type of exclusions involved in the present case.

The basic unfairness of the special or "blue ribbon" jury system in New York County has long been recognized.

We have referred to the official reports of the Judicial Council of the State of New York to the extent that they reported that special juries were useless and biased in favor of the prosecution.

But the Judicial Council's condemnation of the special jury is based on grounds in addition to these.[11]

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[11] So much of the Reports of the Judicial Council as deals with special juries is set forth in this brief as Appendix D, pp. 36-53

In its *Third Annual Report* (Legislative Document No. 48, 1937), the Judicial Council stated (p. 123, Appendix D herein, p. 36):

> "The Judicial Council recommends legislation abolishing struck juries, foreign juries and special juries. A well-considered jury system will insure an impartial cross-section of the community on every petit jury."

In its *Fourth Annual Report* (Legislative Document No. 48, 1938), the Judicial Council stated (p. 47, Appendix D herein, p. 44) that it was "unjust" "to select supposedly special juries in specific cases."

In its *Fifth Annual Report* (Legislative Document No. 48, 1939), the Judicial Council, referring to the fact that the legal requisites prescribed for the special jurors were then substantially the same as those prescribed for general jury duty, stated (p. 42, Appendix D herein, p. 46):

> "In consequence, as might have been expected, such a special juror inevitably feels superior and such a special jury system becomes distinctly un-American and not consonant with a trial by one's peers."

In subsequent Reports the Judicial Council continues to condemn the special jury as "un-American," and in its current Report (*Twelfth Annual Report*, Legislative Document No. 17, 1946) the abolition of the special jury is placed as Number 1 of its renewed recommendations (p. 53, Appendix D herein, p. 53).

The Judicial Council is not alone in its condemnation of the special jury system. In his message to the New York Legislature on January 14, 1941, former Governor Lehman recommended the abolition of "blue ribbon" juries, declaring them to be "at war with our basic concepts of a democratic society." He stated:[12]

> "I recommend that blue ribbon juries be abolished. These special juries are used only in the Counties of New York, Bronx, Kings, Queens and Westchester.

[12] *New York Times*, January 15, 1941, p. 16.

This in itself is untenable. There is no reason why special juries should be used in one part of the State and not in another—if the practice is sound.

However, I do not believe the practice is sound. The use of special or so-called blue ribbon juries is not consonant with the preservation of the constitutional right to a trial by a jury of peers. It is at war with our basic concepts of a democratic society.

It is well known that blue ribbon juries are chosen to be convicting juries. This is demonstrated by a special study made by the Judicial Council. This study clearly establishes that the percentage of convictions to acquittals is much higher in cases tried by special juries than in cases tried by ordinary juries. While blue ribbon jurors are taken from the ordinary jury list, unlike other jurors, they are given a personal interview by the Commissioner of Jurors. Thus, by a process of eliminating jurors who have previously served on blue ribbon juries which have ended in acquittal or disagreement, special juries are particularly selected to be convicting juries. To say the least, such a practice is inexcusable. That it exists is borne out by the facts.

It has been urged by prosecuting officials of the five counties affected that our ordinary juries are not of sufficiently high caliber. If that was ever true, it is not true today. Recently we have removed most jury exemptions and empowered women to serve on all juries. Many new administrative improvements have been adopted, particularly in New York County, and these same improvements are now being adopted in all other counties in New York City. Today it is more than ever unjust and unnecessary to select special juries in specific cases. Blue ribbon juries should be abolished."

Petitioner does not contend that due process of law is satisfied only if a panel from which a jury is selected contains representatives of all economic, social, religious, racial, political, and geographical groups in the community.

What petitioner does claim is that "the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an

impartial jury drawn from a cross-section of the community" (*Thiel* v. *Southern Pacific Co.*, 90 L ed Advance Opinions 922, 924), and that the deliberate and intentional exclusion of segments of the community from the jury panel can reach a point where the trial of a person before a jury chosen from such a panel denies to him due process of law under the Fourteenth Amendment.

Petitioner does not believe that the Court is called upon here to determine whether the intentional exclusion of any one of the particular groups excluded in the present case would constitute a denial of due process of law under the Fourteenth Amendment. Inquiry as to whether due process has been satisfied in trial procedure is particularly directed to the circumstances of the case at hand. *Snyder* v. *Massachusetts*, 291 US 97, 116, 78 L ed 674, 684, 54 S Ct 330, 336 (1934).

It is petitioner's claim that the intentional exclusion from the jury panel of laborers, operatives, service employees, craftsmen, foremen, and women, particularly those not members of so-called "civic conscious" organizations, amounted to such a flagrant disregard of the American tradition of trial by jury, which necessarily contemplates an impartial jury drawn from a cross-section of the community, as to constitute a denial of due process of law under the Fourteenth Amendment.

If, as petitioner asserts, there was this fundamental unfairness in the manner of his conviction of a crime, the question of actual prejudice is immaterial. *Tumey* v. *Ohio*, 273 US 510, 535, 71 L ed 749, 759, 47 S Ct 437, 445 (1926); *Patton* v. *United States*, 281 US 276, 292, 74 L ed 854, 860, 50 S Ct 253, 256 (1930); *Glasser* v. *United States*, 315 US 60, 75-76, 86 L ed 680, 702, 62 S Ct 457, 467 (1942); *Lyons* v. *Oklahoma*, 322 US 596, 597, 88 L ed 1481, 1483, 64 S Ct 1208, 1210 (1944); *Malinski* v. *New York*, 324 US 401, 404, 89 L ed 1029, 1032, 65 S Ct 781, 783 (1945).

FOURTH POINT

Section 749-aa of the Judiciary Law of the State of New York is unconstitutional and void as applied to petitioner in that it denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution. This statute sets forth no standard to guide those charged with the selection of special jurors and therefore enables these officials to act arbitrarily, unreasonably, and capriciously in selecting special jurors. Furthermore, these officials in fact acted arbitrarily, unreasonably, and capriciously in selecting the special jury panel from which petitioner's jury was drawn.

Section 749-aa of the *Judiciary Law* of the State of New York, the law authorizing the empanelling of special juries, furnishes no rule or standard to guide or govern the County Clerk in the selection of special jurors. Accordingly, it enables the County Clerk and his deputies to act arbitrarily, unreasonably, and capriciously in selecting special jurors. Such a statute denies petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution. See *Yick Wo* v. *Hopkins*, 118 US 356, 30 L ed 220, 6 S Ct 1064.

However, the Court is not obliged to pass on the validity of the statute tested only by the opportunities for the denial of due process which its terms afford. The evidence in this case shows that the officials of the Division of Jurors in fact acted arbitrarily, unreasonably, and capriciously in selecting the members of the special jury panel from which petitioner's jury was drawn. This evidence establishes conclusively that these officials without any justification whatever rejected for special jury duty laborers, operatives, service employees, craftsmen, foremen, and women, particularly those who were not members of "civic conscious" organizations.

Petitioner was accordingly denied the due process of law guaranteed to him by the Fourteenth Amendment. *Fiske* v. *Kansas*, 274 US 380, 71 L ed 1108, 47 S Ct 655 (1927); *Nectow* v. *Cambridge*, 277 US 183, 72 L ed 842, 48 S Ct 447 (1928); see *Yick Wo* v. *Hopkins*, 118 US 356, 30 L ed 220, 6 S Ct 1064 (1886).

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

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APPENDIX A

Section 749-aa of the *Judiciary Law* of the State of New York

§ 749-aa. Special jurors in certain counties.

1. List of special jurors. The county clerk of each county of the state having a population of one million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them of the department in which such county is situated shall, from time to time direct. The names of the persons so selected liable to serve as special jurors shall be entered in suitable books alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose

opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy or secretary as to his qualification and fitness to serve as a special juror. Such county clerk may issue a subpoena requiring any person within such county to attend before him, his deputy or secretary at a time specified for the purpose of testifying concerning the qualification or fitness of himself or any other person to serve as a special juror, and the propriety of the selection of such special juror. A person subpoenaed must attend and testify accordingly. In case of his failure to attend and testify as required by such subpoena, or a refusal to be sworn, or to answer any legal or pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. All of the provisions of sections four hundred four through four hundred fourteen of the civil practice act, sections twenty-five and twenty-six of the civil rights law, are made applicable to the enforcement of the provisions of this subsection, except that no fees are required to be paid to any person so subpoenaed. The county clerk, in the record made by him of the jurors selected as such special jurors, shall enter the age of each special juror so selected, his business or vocation, if any,

the length of his residence in the state and county and, if naturalized, the date of his naturalization. Such record shall be a public record and shall be open to inspection.

4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. The order must specify the time when the drawing of such special jury shall take place and the number of special jurors to be then drawn, the term of the court and particular day in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under subsection six of this section, be at least five days in addition to any Sunday, holiday or half-holiday, after the day specified for the drawing of the special jury.

5. Drawing; notification of jurors. At the time specified in the order the special jury shall be drawn at the office of the county clerk as provided in section six hundred and two of this chapter. A minute of the drawing must be kept by the county clerk, or his deputy, which must be entitled in the action in which the jury is to serve specifying the term of court and the particular day in the term when the special jurors so drawn must attend; and there must be entered thereon the name of each juror drawn. Such minute must be signed by the judge or justice and by the county clerk, or his deputy, present at the drawing and such minute so signed must be filed in the office of such county clerk. Such county clerk must notify each juror therein named in the manner provided for trial jurors, except that provisions as to intervals of time with regard to the notification of trial jurors shall not apply. Before the day specified for the attendance of the special jurors the county clerk must file with the clerk of the trial court, part or term at which the juror is required to attend, a certified copy of the minute with a return indorsed thereon or annexed thereto specifying the manner in which each juror was notified and the time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom such service shall have been made, stating the manner, time and place of such service shall accompany such return.

6. Additional jurors; drawing. If the panel of the special jurors thus drawn shall be exhausted before a jury is completed, or if the trial court shall be of the opinion that additional special jurors will probably be needed to complete the jury, the trial court may, from time to time, direct that such additional special jurors be drawn for the trial as it may deem expedient. The order must specify the number to be drawn, the time of the drawing and the time when such additional jurors shall be required and notified to attend. Such additional drawing shall be made by the same officers authorized to draw the special jurors.

either in open court in the presence of the judge or justice presiding at the trial, or at the office of the county clerk as prescribed in such order, and shall be conducted in the same manner as the original drawing and a minute thereof kept and certified as prescribed for the original drawing, and the jurors so drawn shall be summoned in the same manner as those originally drawn.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore compiled, shall be the special jury list for such county subject to such revision thereof by striking therefrom and adding thereto the names of such jurors as from time to time the county clerk shall deem proper.

9. Appellate division to make rules. The justices of the appellate division of the supreme court of the department embracing the county in which such special jury list shall be constituted shall make such rules and regulations not inconsistent with the provisions of this section as shall be necessary to regulate the making of the application for a special jury under the provisions of this section for the

drawing and attendance of such jurors and for the proper and efficient enforcement of the provisions of this section.

10. Violations of section or rules, penalty. Any violation of this section, or of such rules and regulations prescribed by the appellate division of the supreme court shall be deemed a contempt of court under section seven hundred fifty of the judiciary law and such rules and regulations may be enforced as if a violation thereof were such a contempt as provided by section seven hundred fifty-one of the judiciary law.

APPENDIX B

Further Provisions of the Judiciary Law of the State of New York Relating to Jurors in New York County

§ 590. County clerk to select, draw, summon and empanel jurors.

The county clerks of the counties included within a city having a population of one million or more shall select, draw, summon and empanel all jurors for all courts within their respective counties and shall decide upon their qualifications and exemptions, in the manner prescribed by this article, article eighteen-B of the judiciary law, those sections of the code of criminal procedure regarding grand jurors, or the rules adopted pursuant thereto. But this section shall not operate to impair the right to challenge a particular juror at a trial.

§ 591. County jury board.

There shall be established for each county of a city having a population of one million or more a "county jury board" which shall consist of the presiding justice of the appellate division of the supreme court for the department embracing the county, or his designee from among the justices of the court, a justice of the supreme court residing in the county to be designated by the justices of the appellate division for the department embracing the county, one judge of the court of general sessions or of the county court residing in the county, to be designated by the justices of the appellate division of the department embracing the county, and the county clerk of the county. Such designations, except of the county clerk, shall be made in writing, filed in the office of the county clerk, and shall continue in effect until changed.

In the counties of New York and Bronx, the mayor of the city of New York shall also be a member of the county jury board.

The county jury board shall exercise the powers and duties in regard to the selection of grand jurors as prescribed by section two hundred and sixty-seven-aa of the code of criminal procedure.

The county clerk shall also consult with the county jury board in regard to the proper and efficient administration of the jury system.

§ 592. Appellate divisions to make rules.

The justices of the appellate divisions of the supreme court in the first and second judicial departments, or a majority of such justices, acting jointly, shall adopt and may from time to time amend and rescind rules not inconsistent with statute, to regulate the time, manner and practice of examining, selecting, drawing, summoning and empaneling jurors, and the number of each to be selected, drawn and empaneled in and for the several courts within the counties of a city having a population of one million or more, and in addition to regulate in any other respects the duties enjoined by law on the county clerks and on the county jury boards in such counties with respect to the administration of the jury system.

§ 593. Specific power and duties of county clerk.

The county clerk shall be an officer of all courts of record located in the county in which he acts and shall have authority to administer oaths or affirmations in relation to any matter relating to his duties under this article, article eighteen-B of the judiciary law, those sections of the code of criminal procedure regarding grand jurors or the rules adopted pursuant thereto.

He shall keep a record of all proceedings before him, or in his office.

He must furnish a copy of each paper filed or proceedings taken in his office, to any person applying therefor and paying the fees, except that answers, data and information obtained in interviewing and examining prospective jurors shall be considered confidential and shall not be disclosed

except as permitted by the appellate divisions. The county clerk shall charge the same fees for furnishing copies of papers as the clerk of a court of record, and shall pay over all such fees to the treasurer of the city of New York.

The county clerk may designate from among the members of his staff, by a certificate filed in his office, any deputy or assistant to perform any of his duties with respect to jurors as required by law.

Whenever reference is made to the county clerk in this article, article eighteen-B of the judiciary law, those sections of the code of criminal procedure regarding grand jurors or the rules adopted pursuant thereto, such reference shall be deemed to apply also to deputies or assistants duly designated by him, except where the contrary intent is plainly apparent from the context.

In accordance with the law and pursuant to the rules of the justices of the appellate division, each county clerk shall:

(1) make personal examination of individuals concerning their eligibility or the eligibility of others for jury service, and for that purpose to issue and enforce notices, mandates and subpoenas,

(2) hear and determine claims for exemption from jury service within the county,

(3) prepare ballots for qualified jurors,

(4) draw panels of jurors for regular and adjourned terms of court,

(5) notify and summon jurors drawn for service,

(6) take any steps necessary to bring about the punishment of those who violate the laws and rules relating to the drawing, selection, summoning and empaneling of jurors,

(7) consult with the county jury board as provided in section five hundred and ninety-one of this article, and

(8) do all things necessary and proper for the true execution of his powers and duties.

§ 594. Source of names.

The county clerk, in order to ascertain names of persons eligible as jurors, may consult the latest census enumeration, the latest published telephone or city directory, the records of the department of taxes and assessments, the voters' registry list and any other available sources.

Each public officer of a city having a population of one million or more shall upon request at all times furnish to the county clerk of the county in which such public officer acts, without charge, all information within his control to enable such county clerk to procure the names of persons eligible to serve as jurors, as well as information concerning a person's qualifications or lack of qualifications for jury service.

§ 595. Examination as to fitness; personal interviews; police records.

No person's name shall be entered on a jury list unless (a) he has been personally interviewed by the county clerk, (b) he has stated his qualifications under oath, (c) his name has been forwarded to the police department for checking against the records of that department and a report received or a reasonable time has elapsed without such a report, and (d) the county clerk, in the case of grand jurors, shall also have received a certificate of the central bureau of criminal identification, records and statistics from the state commissioner of correction in accordance with the provisions of section two hundred and sixty-seven-a of the code of criminal procedure.

§ 596. Qualifications of jurors.

In order to be qualified to serve as a juror in the counties included within a city having a population of one million

or more, a person must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June Thirtieth next thereafter, is a resident of that county, within the meaning of this section.

§ 597. Juror with scruples against death penalty.

No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of any crime punishable by death. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.

§ 598. Disqualifications.

Each of the following officers is disqualified to serve as a juror:

1. All elected members of the federal and state executive departments and of the executive department of any political subdivision of the state.

2. The comptroller; the attorney-general; the head of a department or the head and members of a board, council or commission which is the head of a civil department of the federal or state government, or of any political subdivision of the state; members of the state tax commission; members of the state commission of correction; members of the state industrial board; members of the public service and transit commissions; the commissioner of education; the commissioner of agriculture and markets; the commissioner of social welfare and the deputy of each officer specified in this subdivision; the secretary to the governor.

3. A member of congress or of the legislature, or a member of the city council of the city of New York.

4. A judge of a court of record, or a surrogate.

5. A sheriff, under sheriff, or deputy sheriff, regularly engaged in the performance of his duties.

6. The clerk or deputy clerk of any court.

No public officer or employee of the United States government, or of any state, city or municipality, or of any political subdivision of any of them, or of any official board, authority, council, commission, corporation, or other agency of any of them, shall serve on any grand jury. This prohibition shall not apply, however, to any public officer serving without compensation, or for compensation of not to exceed one dollar a year, on any local, appeal or advisory board established under the selective service system of the United States pursuant to the provisions of the "Selective Training and Service Act of 1940," or any amendments

thereof, nor shall it apply to those who are public officers or employees of the state solely by virtue of their membership in the New York guard pursuant to article two-A of the military law. For the duration of the war and for the period to which the annual grand jury list in effect at its termination shall be applicable this prohibition shall not apply to any public officer or employee mentioned in the first sentence of this paragraph who serves as such public officer or employee without compensation or for compensation not in excess of one hundred dollars per year.

§ 599. Exemptions.

Each of the following persons only, any inconsistent provision of law to the contrary notwithstanding, although qualified, is entitled to exemption from service as a juror upon claiming exemption therefrom: 1. A clergyman or minister of religion officiating as such and not following any other calling.

2. A practicing physician, surgeon, or dentist having patients requiring his daily professional attention, a licensed pharmacist actually engaged in his profession as a means of livelihood, a duly licensed embalmer actually engaged in his profession as a means of livelihood, and an optometrist actually engaged in the practice of optometry.

3. An attorney or counsellor at law regularly engaged in the practice of law as a means of livelihood.

4. A person belonging to the army, navy or marine corps of the United States, and the active national guard and naval militia of the state.

5. A member of a fire company or department or police force or department duly organized according to the laws of the state or any political subdivision thereof and performing his duties therein; or an exempt volunteer fireman, as defined in section two hundred of the general municipal law.

6. A captain, engineer, or other officer, actually employed upon a vessel making regular trips; or a licensed pilot actually following that calling.

7. A woman.

8. An editor, editorial writer, a sub-editor, reporter or copy reader, actively and regularly employed in the handling or gathering of news for a daily, semi-weekly or weekly newspaper.

§ 600. Evidence of exemption.

The evidence of the right to exemption as prescribed in section five hundred and ninety-nine is as follows:

An affidavit of the applicant or of another person in his behalf satisfactory to the county clerk stating the facts entitling the applicant to exemption, or in the case of an exempt volunteer fireman, the certificate provided for in section two hundred and two of the general municipal law.

Each affidavit must be filed with the county clerk and must be kept open by him at all reasonable times to public inspection.

The right to exemption must be claimed at the time of examination for liability to serve as a juror, except that a woman may claim such right to exemption at any subsequent time. If a male fails to present such claim at such time, he shall be deemed to have waived the same and cannot be exempted thereafter except for reasons accruing after the time of examination. If, however, he claims exemption at the time of his examination and is not granted the same, he may present such claim for exemption to the court when drawn for jury service or may review such refusal in the manner provided by article seventy-eight of the civil practice act.

§ 601. Length of service of jurors and limitation on recurrence thereof.

The length of service of grand or trial jurors in any county included within a city having a population of one million or more shall be determined by rules adopted pursuant to this article.

A person who has served his term as a trial juror in any court within the state, including a federal court, unless he is engaged in the trial of an action or proceeding when his term expires, shall not be qualified to serve again as a trial juror in any court within any county included within a city having a population of one million or more for two years subsequent to the last day of his service.

A person who has served his term as a grand juror in any court, including a federal court, within any county included within a city having a population of one million or more, shall not be qualified to serve again as a grand juror or as a trial juror in any court within such county for one year subsequent to the last day of his service.

Nothing contained in this section shall invalidate a verdict returned by a trial jury or an indictment returned by a grand jury, even though such trial or grand jury includes one or more trial or grand jurors respectively not qualified by virtue of such previous service.

§ 602. Officers to attend drawing.

On a day designated by the county clerk, at least one judge of a court of record residing or sitting in the county, to be designated by the justices of the appellate division of the supreme court of the department embracing the respective counties, must supervise the proper drawing of jurors for terms of courts of record where issues are triable by a jury.

603. County clerk to notify jurors.

The county clerk must notify each juror drawn for jury service by serving upon him a notice to that effect and speci-

fying the place where and the time when he is required to attend. The notice may be served by mail, personally, or by leaving it at the juror's residence or place of business with a person of suitable age and discretion.

§ 604. Excuses and postponements.

The judge of the trial court may, in his discretion, on the application of a trial juror, excuse him from a part or the whole of the time of service required of him as a juror or may postpone the time of service of a juror to a later day during the same or any subsequent term of the court.

A person who has been notified to attend and who applies to be excused as prescribed in this section must present the notice to the judge in open court. If he cannot personally attend he must send it by a person capable of making the necessary proof in relation to his claim to be excused.

A note of the excuse and of the reason therefor, attested by the judge, who must append his signature or initials thereto, must be made or endorsed upon the notice to attend; or, if the person notified has not brought it into court, upon a separate piece of paper which must be transmitted to the county clerk as part of the report specified by rule.

§ 605. Discharge by the court.

The court must discharge a person from serving as a trial juror in the following cases, where the causes justifying the discharge have arisen after examination for liability or where the person has claimed exemption at the time of examination and was refused: 1. Where it satisfactorily appears that he is not qualified:

2. Where it satisfactorily appears that he is disqualified:

3. Where it satisfactorily appears that he is exempt and he claims the benefit of the exemption.

Where a person is discharged for any of the causes specified in this section, the county clerk must destroy the ballot containing his name.

§ 606. Penalties.

A person who, in the manner set forth in article one hundred and sixteen of the penal law, shall hinder or obstruct the proper administration, or violate any of the provisions of this article, of article eighteen-B of the judiciary law, of those sections of the code of criminal procedure regarding grand jurors, or the rules adopted pursuant thereto, shall be subject to the penalties provided in said article of the penal law.

§ 607. Trial jurors drawn for court of record to serve in other parts, terms or courts.

Trial jurors drawn for service in any court of record must serve as trial jurors in any other term or part of the same court when it sits in terms or parts, or, by consent of such court, in any other court of record sitting at the same time in the same courthouse. They may also so serve in any court of record sitting in the same county. When so serving in such other term, part or court their service shall be with the same power, force and effect as if they had been drawn as trial jurors for service in such other term, part or court.

§ 608. Sheriff's jurors.

The county clerk of each county in a city having a population of one million or more shall select annually from the persons qualified to act as trial jurors, the names of such number of persons as he deems necessary to constitute the sheriff's jurors for that year.

The county clerk shall draw and summon panels of sheriff's jurors, upon request of the sheriff.

APPENDIX C

Rules Relating to the Jury System in the City of New York

Pursuant to the provisions of section 592 of the Judiciary Law, as added by chapter 202 of the Laws of 1940, the Justices of the Appellate Division of the Supreme Court in the First and Second Judicial Departments, acting jointly, do hereby adopt the following rules in relation to the jury system in the City of New York:

PART A.—Rules Relating to Jurors Generally.

Rule I.

Subpoenaing for Examination.

No person shall be selected to serve as a juror unless the county clerk has passed upon his qualifications in accordance with the provisions of article seventeen of the Judiciary Law. For this purpose the county clerk may cause to be served upon any person in the county a subpoena requiring such person to appear before him for the purpose of testifying under oath as to the competency, qualifications and liability of himself or any other person to serve as a juror and to present claims for exemption or disqualification. Such person shall not be entitled to any fee or mileage. Such subpoena may be served personally or by leaving it at the person's residence or place of business with a person of suitable age and discretion, or by mail. If served personally or by substitution the subpoena shall require the person summoned to attend not less than three days after service. If served by mail the subpoena shall require the person summoned to attend not less than five days after the mailing thereof.

One or more successive subpoenas may be served upon the same person where he fails to attend as required by a former subpoena. Where a person has so attended twice and furnished all information required, he shall not be required to attend again for one year thereafter. But the county clerk may, in his discretion, dispense with the personal attendance of the person so notified where another person cognizant of the facts is produced and testifies in his stead and it appears from the testimony of such other person that the person notified is disqualified, not qualified or exempt.

Rule II.

Examination—Questionnaires—Index Cards or Books.

Every person appearing for examination as a juror shall be required to fill out, in his own hand, sign and swear to, a written questionnaire. Each questionnaire shall be contained on a card or other paper of a size convenient for handling and shall be in the form prescribed by rule seventeen.

In addition to the questionnaire there shall be made out for each person appearing for examination an index card containing the name of said person, whether he has qualified for jury service or whether he is disqualified, has been rejected, or is otherwise not liable for service, whether he has been chosen for the grand, special or sheriff's jury, and such other information as may be deemed desirable by the county clerk and which may be conveniently inserted on the card. These cards shall be filed alphabetically according to the last name of the person regardless of whether or not he is liable for jury service. They shall be keyed to the questionnaires and shall constitute an index of all persons appearing before the county clerk for qualification as jurors. They shall be kept, if possible, in a visible index file.

A county clerk, instead of using index cards, may keep the required information in properly indexed books. In such event, whenever index cards are referred to in these rules, the reference shall be deemed to include such books.

After the person has filled out the questionnaire he shall be personally interviewed, under oath, by the county clerk.

After the person's examination is concluded and he is found otherwise qualified, his name shall be forwarded to the police department for checking against the records of that department, subject to the provisions of section five hundred ninety-five of the Judiciary Law.

Upon the basis of the questionnaire, the personal interview and the check against the police records, the county clerk shall decide whether the person interviewed is qualified to serve as a juror. In accordance with the decision he shall note on each questionnaire in a prominent place whether the person has been accepted, or found disqualified, not qualified or granted exemption; if accepted, the jury upon which he has been placed shall be noted; if disqualified, not qualified or granted exemption, the reason shall be noted. Where jurors are not qualified, the reason therefor may be indicated by appropriate language or by the symbols R1, R2, R3, R4, R5 and R6 representing the six subdivisions of section five hundred ninety-six of the Judiciary Law. Likewise, exemptions may be indicated by appropriate language or by the symbols E1, E2, E3, E4, E5, E6 and E7 representing the seven subdivisions of section five hundred ninety-nine of the Judiciary Law, and disqualifications may be indicated by appropriate language or by the symbols D1, D2, D3, D4, D5 and D6 representing the six subdivisions of section five hundred and ninety-eight of the Judiciary Law.

There shall be continuous search for persons qualified and liable for jury service, in order to obtain as many prospective jurors as possible and to limit as much as possible repetition of jury service. Before subpoenaing

persons for examination, the county clerk shall check their names against the index cards of names of persons previously examined in the county clerk's office.

Rule III.

Filing Questionnaires.

The questionnaires of persons accepted and the questionnaires of persons rejected shall be filed separately, each in alphabetical order. Whenever any person qualified for jury service becomes exempt or disqualified for reasons accruing since his examination, his questionnaire shall be marked accordingly and transferred to the inactive file. The index card of such person shall also be marked accordingly.

The questionnaires of persons who shall be or shall have become disqualified for jury service because of age or who shall have died shall be kept at least for one year thereafter.

The questionnaires of persons selected to serve as grand, special or sheriff's jurors shall be filed as separate categories, each in alphabetical order. Whenever any person has completed the period for which he has been selected to be a member of the grand, special or sheriff's jury, his questionnaire shall be returned to the file of general trial jurors.

Rule IV.

Notification of Acceptance as Juror.

After a person has qualified satisfactorily for service as a juror, the county clerk may, in his discretion, issue a notice to such person, informing him that he has been found qualified to serve as a juror and that he will be notified when he has been drawn for actual service. The notice shall also request such person to inform the county clerk if he becomes entitled to exemption and claims such exemption or becomes disqualified at any time after his examina-

tion, and shall also request him to inform the county clerk of changes in address or occupation and of any other information which is thought desirable.

Rule V.

Preparation of Ballots—General Ballot Box.

The county clerk shall prepare a ballot for each person as soon as such person has qualified for jury service. The ballot shall contain the name, occupation, address and number of the juror and such other information as the county clerk deems necessary. The ballots shall be kept in a box, to be known as the general ballot box and shall be retained in the office of the county clerk and shall be kept securely locked and sealed except at the time of authorized drawings when it shall be opened in the presence of the judge supervising the drawing and after the drawing shall be again sealed in the presence of said judge. Such general ballot box is to be constructed cylindrical in form with an aperture large enough only to admit conveniently the hand of the person by whom the ballots are to be drawn, the aperture to be provided with a cover so arranged as to be conveniently locked and sealed when closed.

At the time of each authorized drawing the ballots made out since the last drawing shall be placed in the general ballot box after the drawing of jurors is completed, or during the course thereof if the box becomes empty, and before the box is again sealed.

All jurors except grand, special and sheriff's jurors shall be drawn from the said general ballot box.

In lieu of the foregoing, the county clerk for Bronx County or for New York County may at his option keep all ballots, except for those persons on a grand, special or sheriff's jury list, in a securely locked, sealed receptacle in the county clerk's office. Such receptacle may be opened only in order that the ballots may be checked and revised or additional ballots added thereto or, in preparation for

an authorized drawing, to transfer ballots therefrom into a wheel constructed as set forth in this rule. Such receptacle may only be opened for such purposes in the presence of and under the supervision of one of the judges designated by the Justices of the Appellate Division pursuant to section six hundred and two of the Judiciary Law after due notification to attend pursuant to rule six. If this optional method has been followed, such receptacle or wheel, whichever shall be appropriate, shall be deemed to be referred to in these rules whenever the phrase "general ballot box" is used.

Rule VI.

Notice to Judges.

At least three days before a drawing the county clerk must notify in writing the judge or judges of courts of record designated by the Justices of the Appellate Division, to attend at his office on a day designated by him, not more than forty nor less than fourteen days before the day appointed for holding a term of court at which issues are triable by a jury, in order to supervise the proper drawing of trial jurors for that term.

A drawing shall be held if one of such judges shall be present on the designated day; otherwise, the county clerk must again notify such judge or judges. Where it is necessary to renotify a judge or judges of a drawing, such notification may be oral and a reasonable period of time shall be given.

Rule VII.

Mode of Drawing.

The drawing must be conducted as follows:

1. The county clerk must shake the box or turn the wheel containing the ballots so as to mix them thoroughly.

2. He must then, without seeing the name contained on any ballot, publicly draw the ballots out of the box until the requisite number has been drawn.

3. As each ballot is drawn from the general ballot box, it may be checked against the index cards or questionnaires or a list prepared by the county clerk and if it is noted thereon that:

(a) The person whose name appears on the ballot is not liable or qualified for jury service for cause accruing since his examination, or that

(b) the person whose name appears on the ballot has been placed on the grand jury list, the special jury list or the sheriff's jury list the ballot shall be destroyed forthwith or may be set aside and retained in a separate receptacle for not more than two months, such ballots being marked with the reason for such disposition.

4. As each ballot is drawn consideration may, in the county clerk's discretion, be given to the time of year when the juror would prefer to serve.

5. The minute of the drawing must be kept by one of the attending officers who must enter therein the name contained in each ballot drawn, the number assigned to each ballot drawn, and specify for what court and for what time or part each was drawn. The minute of each drawing shall be signed by the county clerk and the attending officers, and filed in the county clerk's office, where it shall be open to inspection.

6. Approved ballots drawn from the general ballot box shall be placed in separate receptacles according to the courts for which they are drawn and shall be kept in such receptacles until the adjournment of the part or term for which they are drawn and shall then be disposed of in accordance with the provisions of rule fifteen as set forth below.

7. When assigning jurors who have been drawn for service in a district of the Municipal Court of the City of New York in a borough which does not have a central jury part, consideration shall be given to the residence or the place of business of such jurors in order that they shall not be unduly inconvenienced.

Rule VIII.

Number of Trial Jurors to be Drawn.

The county clerk shall draw for each term and each separate part of a term of a court of record at which issues of fact are triable by a jury, such number of trial jurors as he believes necessary and sufficient, unless otherwise specified by general order of the court or by a written order of the judge appointed to hold the part or term. Where, in pursuance of the provisions of rule seven, it is necessary to set aside ballots drawn from the general ballot box, the ballots so set aside shall not be considered as part of the number required to be drawn.

Rule IX.

Special Jurors—Ballots and Drawing.

The county clerk shall prepare ballots for every name on the special jury list in the same manner as for trial jurors and shall deposit them in a receptacle to be known as the special jury ballot box which shall be retained in the office of the county clerk and shall be kept securely locked and sealed except at the time of authorized drawings.

The drawings of special jurors shall be conducted in the manner prescribed by law for drawing trial jurors.

A minute of such drawing shall be kept, signed and filed in the same manner as for trial jurors.

This rule shall apply except where inconsistent with statute or rule adopted pursuant to section seven hundred forty-nine-aa of the Judiciary Law.

Rule X.

Sheriff's Jurors—Ballots and Drawing.

The county clerk shall prepare ballots for every name on the sheriff's jury list in the same manner as for trial jurors; and shall deposit them in a receptacle to be known as the sheriff's jury ballot box which shall be retained in the office of the county clerk and shall be kept securely locked and sealed except at the time of authorized drawings.

The drawings of sheriff's jurors shall be conducted in the manner prescribed for trial jurors.

A minute of such drawings shall be kept, signed and filed in the same manner as for trial jurors.

Rule XI.

Length and Time of Service of Trial Jurors.

Trial jurors drawn for a term or a part of a term of any court of record in the Counties of New York and the Bronx shall serve only for two weeks or half a term. Trial jurors drawn for a term or a part of a term or terms of any court of record in the Counties of Kings, Queens and Richmond shall serve for a period not exceeding two weeks or half a term, unless a majority of the Justices of the Appellate Division in the Second Department make an order directing otherwise as to the jurors for any court or term of any court. Such jury service shall, however, continue beyond said periods until the conclusion of any trial on which the jurors may be engaged.

Subject to the above, the county clerk in each county may designate the dates when periods of jury service shall commence.

Rule XII.

Notification of Jurors.

The county clerk must notify each juror named in the minute of trial jurors drawn to attend the term or the part for which he was drawn by serving upon him a notice,

addressed to him, stating that he has been drawn as a trial juror for, and is required to attend, the term or the part specified in the notice on the days specified therein. The notice may contain copies of such portions of article seventeen of the Judiciary Law of sections seven hundred and fifty and seven hundred and fifty-one of the Judiciary Law, and of article one hundred and sixteen of the Penal Law, as he deems advisable.

The notice may be served personally or by leaving it at the juror's residence or place of business or employment with a person of suitable age and discretion at least six days before the beginning of the term or the part for which the juror is drawn. Such notice may also be served by mail if mailed at least nine days before the day appointed for such juror to appear, in which case said notice shall be enclosed in a securely closed postpaid wrapper, addressed to such juror at his residence or place of business or employment and properly posted. If the notice is mailed and is returned by the post office undelivered, it may be remailed to the same address or any other address for the juror which the county clerk may have, not less than two days, exclusive of Sundays or holidays before the day appointed for such juror to appear.

Rule XIII.

County Clerk to Notify Court Clerk.

Before the commencement of the term or part the county clerk must file with the clerk of the court for which jurors are drawn a certified copy of the minute of the drawing, with a return under his hand, indorsed thereupon or annexed thereto, naming each person notified, the time for which he was notified to appear and the time, place and manner of service. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom each service shall have been made, stating the manner, time and place of such service, shall accompany such return.

Rule XIV.

Report by Court Clerk After Conclusion of Service of Jurors.

The clerk of each court for which trial jurors have been drawn shall, within ten days after the close of each term of service of jurors or after the discharge of the jurors if they are discharged before the close of their term of service, file with the county clerk the certified copy of the minute of the drawing of jurors received from the county clerk before the beginning of the term and the county clerk's return thereto, or a copy of such paper certified by the clerk; together with each notice or other paper attested by a judge in regard to the excusing of jurors. The clerk must also deliver to the county clerk therewith his certificate specifying distinctly and in detail as follows:

1. The name and residence of each juror who attended and served; the number of days the juror attended for the purpose of serving; and the number of days he actually served.

2. The name and residence of each juror who was excused, discharged, exempted or declared disqualified by a judge of the court together with any affidavit, certificate or other document or paper submitted by the juror at the time that he was excused, discharged, exempted or declared disqualified.

3. The name and residence of each person notified who did not attend or serve.

4. The name and residence of any person found guilty of contempt of court and the penalty, if any.

The above papers must be filed in the office of the county clerk and shall not be altered or corrected except in pursuance of an order of the court.

Rule XV.

Proceeding Subsequent to Return of Court Clerk's Certificate—Replenishing General Ballot Box.

Upon receipt by the county clerk of the certificate of the court clerk, the information therein contained shall be entered on the record of service of each person named. The proper notations shall also be made on the index cards of the persons named. If the person has become disqualified or exempt or a nonresident or has died, the ballot shall be destroyed forthwith or may be set aside and retained in a separate receptacle for not more than two months, such ballots being marked with the reason for such disposition, and the questionnaire transferred to the inactive file. There must be entered on the questionnaire the reason why the ballot was so disposed of.

The other ballots shall be disposed of as follows:

1. Ballots of persons excused shall be kept out of the general ballot box for the period during which excused and shall then be returned to the general ballot box after the necessary clerical notations have been made.

2. Ballots of persons who have been excused to, or whose time of service has been postponed to some future time, shall be kept apart until such future date at which time they shall be deposited in a separate ballot box. When a drawing of jurors is held for such time, jurors shall first be drawn from such box.

3. Ballots of persons who appeared for service and served for at least five days shall be placed in special receptacles dated according to the month and year when they last served in order to assure their not being required to serve again within two years after appearance for their last service, and shall be kept out of the general ballot box until that time, when they shall be returned to the general ballot box.

Rule XVI.

Additional Jurors.

At any time during the sitting of a term of a court in the county, the court may direct an additional number of trial jurors to be drawn for the term or for the part at which the order is made. The order must specify the number of jurors to be drawn and the time of drawing. The drawing shall be held in the office of the county clerk in the manner provided for regular trial jurors, except that notice is not required.

The county clerk must forthwith notify the additional jurors thus drawn by such a notice as the court directs, to attend the term or part at the time specified in the order. The county clerk must forthwith file with the clerk of the court for which additional jurors were drawn a return, under his hand, naming each person notified as prescribed above and specifying in each case the manner, time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom the service shall have been made, stating the manner, time and place of such service, shall accompany such return.

Rule XVII.

Form of Questionnaire.

The questionnaire to be filled out by prospective jurors shall contain the following information and shall be in such form as the county clerk may prescribe:

Qualifications to Serve as Juror

State of New York, County of ..... ss.:

Date	Result	By Whom Examined
	[Do not write in this box]	

The undersigned, being duly sworn, makes the following answers [Explanations or remarks concerning answers may be made in ruled box on reverse side]:

1. Print name in full .....

First name

.....

Middle name Last name

Married Single Widower
Divorced Separated No. of Children

2. Date of birth [Month day year]

Color Color hair Color eyes
Wear glasses Distinguishing physical characteristics Weight Height

3. Residence Apt. No. Tel. No.

4. Are you the tenant If not, with whom do you live How long living at present address How long in N. Y. State
In County

5. Former residences for past six years

6. Give any other name you have used or been known by Did you register at last election
Where did you live then

7. Place of Birth [City State]
If not American born, how became citizen
When naturalized Where

8. Education: Primary, High School, College, degrees, special studies, etc.

9. Occupation Employed at present
Business Address Tel. No.

10. Firm name of employer How long in present employment

11. What other employment during past six years

12. Wife's name Her occupation
Her firm Her business address

13. Do you or your wife own property (such as bank account, furniture, insurance, trust funds, stocks, bonds, mortgages, land, etc.) worth $250
Describe property

14. Are you employed on a Federal, State or City Public Works Project Are you on relief
Ever served as a juror
In what court and when did you last serve

15. Ever been denied listing as a qualified juror or been stricken from any list of jurors
Where and why

16. Are you physically disabled or incapacitated
Is your hearing or eyesight so impaired that you could not intelligently follow a case in court
Ever confined to a State or Private Institution

17. If your answer to any question on line 16 is "yes," give all particulars

18. Ever arrested or indicted on a criminal charge
Ever convicted
Have you ever had any trouble with the authorities
This includes a violation of a traffic ordinance, or statute or any other ordinance
Any judgment ever been entered against you in a civil court on allegations of fraud or misconduct

19. Any judgments outstanding against you
Nature of actions in which obtained

20. Have you ever been in bankruptcy or made a general assignment for the benefit of creditors
Have you conscientious scruples against the death penalty which would preclude you from finding a defendant guilty if the crime charged be punishable by death

21. Have you such opinions as would prevent a verdict of guilty in a criminal case upon circumstantial evidence Do you doubt your ability to lay aside opinions or impressions, the result of newspaper reading or hearsay, and render an impartial verdict upon the evidence

22. Are you aware of any prejudice against any State law which would prevent a finding of guilty for violating such law Have you such a prejudice against any particular defense to a criminal charge as would prevent your finding a fair and impartial verdict upon its merits

23. By law the failure of a defendant in a criminal case to testify is not considered as any evidence of his guilt. Would you give a defendant the benefit of this law What months of the year between October 1 and June 30 would you prefer to serve (Name at least two months)

24. Is there anything which would influence you as a juror, as affecting any person, or class of persons because of nationality, sex, color, race, religion, wealth, occupation, political affiliation, social or economic belief or any other reason

Sworn to before me this day of 19

The foregoing answers are true in all respects

Sign Here .....

Month Service Preferred												Cap. Pun.						
Name			Residence			Occupation			Business Address					Date of Birth				
1	2	3	4	5	6	7	8	9	10	11	12	Yes	No			AJ	SJ	PJ	Sh. J

(*Reverse side of questionnaire*)

State of New York,
County of ss.:

being duly sworn, deposes and says: I do not dwell or lodge in the County of for the greater part of the time between the first day of October and the thirtieth day of June next thereafter, and I am not a resident of said County; but I reside permanently at , City of , County of , State of , and have resided there since

.....

Sworn to before me, this day of 19

.....

Deputy County Clerk

State of New York,
County of ss.:

being duly sworn, deposes and says: I am entitled to and claim exemption; I am disqualified; from doing jury service for the following reason

.....

Sworn to before me, this day of 19

.....

Deputy County Clerk

Explanations of any answers on opposite side of this form, or remarks, may be made here

(ruled box)

RECORD OF JURY SERVICE

Date Placed in Wheel	Term Drawn	Court	Days Served: Days in Attendance	Days Served: Days Actually Served	If Excused Reason

(16 lines)

Changes of Address

Business Address
Residence

PART C.—RULE OF CONSTRUCTION.

RULE XXX.

Rule of Construction.

Whenever a word of masculine gender is used in these rules, it shall be understood to apply to female as well as male jurors.

APPENDIX D

Excerpts from the Reports of The Judicial Council of the State of New York

Third Annual Report of The Judicial Council of the State of New York (Legislative document No. 48, 1937), pp. 123-128):

"The Judicial Council recommends legislation abolishing struck juries, foreign juries and special juries. A well-considered jury system will insure an impartial cross-section of the community on every petit jury. The limitation of jury exemptions put into effect in 1936 upon recommendation of the Judicial Council and the proposal for women jurors are a part of this plan to provide petit juries of such uniformly high calibre for both civil and criminal cases that there will be no need for extraordinary juries.

* * * * * * *

The struck jury in civil cases and special jury in civil and criminal cases, although designed to provide more intelligent and capable jurors in exceptional cases do not necessarily bring about the desired result. Both types of juries are selected from the ordinary jury list. Restrictions placed upon their choice do not distinguish them particularly from ordinary juries and are similar to restrictions placed by the courts upon the regular choice of any juror."

* * * * * * *

Struck and Special Juries

The cardinal features of the special and struck juries are much the same—that the issue to be tried is either so extraordinary or intricate or that such a state of public excitement exists, as to render it unlikely that a fair and impartial trial can be had unless more than ordinary care is exercised in the selection of a jury. They differ, however, in the method of selection.

In New York, the present struck jury provisions stem from the Revised Statutes of 1829-30 [2] and come down through the Code of Civil Procedure.[3] The present provisions were derived, almost verbatim, from the Code, sections 1063 and 1067 becoming Civil Practice Act section 449, and the remaining sections becoming sections 749-a through 749-e of the Judiciary Law.

Struck juries may be obtained throughout the State on demand of either party, the party making the application being responsible for the cost of striking the jury. Civil Practice Act, section 449, provides that in any action triable in the Supreme Court, where it appears to the court that the action requires such a jury, it is mandatory upon the court to so order. Section 449 further provides that such jury shall be struck in the manner provided by the Judiciary Law.

Sections 749-a through 749-e of the Judiciary Law govern the striking of a jury. The commissioner of jurors or the county clerk, as the case may be, in the presence of the parties, selects from the general jury list the names of forty-eight persons whom he deems most indifferent between the parties and best qualified to try the case. These are the only qualifications required other than the general qualifications of the Judiciary Law applicable to all jurors. The parties then beginning with the party on whose application the jury was ordered to be struck, alternately strike off twelve names each from the list. The jury is chosen from the remaining twenty-four names.

Several states, including Michigan,[4] Delaware,[5] Virginia,[6] West Virginia [7] and Indiana [8] provide for such a jury.

The special jury was first established in 1896,[9] for criminal cases in counties with a population of over five hun-

[2] 2 R. S. 418, sec. 46 through sec. 50; 2 R. S. 419, secs. 51, 52.
[3] C. C. P. sec. 1063 through sec. 1069.
[4] 1929 Compiled Laws, secs. 14294-14300.
[5] 1915 Revised Code, secs. 4274-4276.
[6] 1919 Va. Code, sec. 6005.
[7] Michies Code, sec. 5647, ch. 56, art. 6, sec. 13.
[8] 1926 Burns Revised Statutes, secs. 1827-1829.
[9] L. 1896, ch. 378.

dred thousand, to be drawn in each case by a special jury commissioner from a specially selected list. This statute was repealed in 1901,[10] but the same type of special jury was simultaneously re-established.[11] At present a special jury can be drawn for both civil and criminal actions in all courts of record in counties having a population of one million or more or a county having a population of four hundred thousand or more adjoining a county having a population of one million. This provision, therefore, now applies to the counties of New York, Kings, Queens, Bronx and Westchester. A similar and apparently overlapping provision, specifically for Kings county, had been enacted by Laws of 1902, chapter 564.

In these counties, it is provided that the commissioner of jurors shall select from among those persons qualified to serve as trial jurors, such persons as he deems qualified, after a personal examination, to serve as special jurors.

No one is eligible to serve as such special juror who is opposed to the death penalty or who is influenced by the newspapers or unable to render an impartial verdict, or opposed to circumstantial evidence, or who is prejudiced against a law of the state, or prejudiced against a particular defense to a criminal charge or who cannot in all cases give to the defendant failing to testify in his own defense the full benefit of the statutory provision that such defendant's neglect or refusal to testify shall not create a presumption against him.

Application for a special jury may be made by either the district attorney or defendant in criminal actions or by either party in civil cases. It is discretionary with the court to order such a jury drawn where it appears necessary because of the importance or intricacy of the case or because the subject-matter has been so widely commented on that it would take too long to obtain an ordinary jury

[10] L. 1901, ch. 601.

[11] L. 1901, ch. 602 as amended by L. 1904, ch. 458, L. 1913, ch. 587, L. 1920, ch. 112, L. 1923, ch. 742.

or that for any other reason the due, efficient and impartial administration of justice would be advanced by trial by a special jury.

The provisions for struck juries were designed to provide more intelligent and capable juries in exceptional cases. However, such a jury is a special one only because it is selected in a particular manner. It is not special in the sense of providing persons better qualified than the ordinary jurors. Since the persons from whom a jury is struck are selected from the ordinary jury list, the only additional qualifications being that they shall be those whom the commissioner of jurors or the county clerk deems most indifferent between the parties and best suited to the case, there is no reason to suppose that they will be superior to the other persons on the general list from which they come. As a practical matter, the chief effect of the struck jury would seem to be that each side is given ten more peremptory challenges upon payment of the added expense.

Struck juries may have been suited to conditions a century ago but they no longer have practical use and are inconsistent with the present practice of jury pooling. In the larger counties it would be difficult for the commissioner of jurors to choose forty-eight names from a list of thousands with any real knowledge of their qualifications. In the smaller counties, on the other hand, where the parties to an action usually know the prospective jurors, the result of striking a jury would probably be the obtaining by each side of a jury as partial to its own interests as possible.

The Judicial Council has inquired as to the use of struck juries in every county of the State during the past five years. The responses indicate that the struck jury is almost never used. Only one county reported one struck jury during the five-year period. In many counties no jury had been struck in from ten to twenty years. There is no reason for keeping on the statute books a provision that is practically obsolete.

The courts have recognized the fact that struck juries are no longer desirable. In *Jerome* v. *The New York Evening Journal Publishing Company*, First Dept. (1908), 124 A. D. 372, the appellant appealed from an order of the Supreme Court providing that a jury be struck in accordance with the application of the respondent. The Appellate Division agreed that this case presented unusual features which should be tried by jurors of more than general knowledge and intelligence but declared that since in important cases it had been found impractical to fill the jury box from the list of struck jurors, and in view of chapter 602 of the Laws of 1901, as amended by chapter 458 of the Laws of 1904, providing for a special jury in New York county, it directed trial by a special jury instead of by a struck jury. The Judicial Council has been informed by the commissioner of jurors for New York county that no struck jury has been drawn in New York county since this decision.

In the case of *People* v. *McClellan*, First Dept. (1908), 124 A. D. 664, the defendant was granted a motion for a struck jury. Upon plaintiff's appeal, the Appellate Division affirmed the order but declared that there was presented "* * * a case of the gravest importance. * * * For these reasons it is proper that it should be tried before a jury specially selected. We consider, however, that an impartial and satisfactory jury can be more surely and speedily obtained by a resort to the special jury panel provided for by chapter 602 of the Laws of 1901, as amended by chapter 458 of the Laws of 1904, than by an attempt to procure a struck jury."

The special jury, however, as provided for by Laws of 1901, chapter 602, although it was an attempt to provide a jury of persons with special qualifications is subject to the same criticisms as the struck jury.

Special jurors, like struck jurors, are chosen from the regular jury list; therefore they are not more specially qualified than the other persons on the list. Although the commissioner of jurors selects special jurors after per-

sonal examination, the restrictions he is required to apply to prospective special jurors are in no way different from those applied by the courts to jurors chosen in the regular manner. A well-administered ordinary jury system should produce jurors of as high calibre for every action as the special jury system attempts to provide in exceptional cases.[12]

Recommendations

To effect the abolition of foreign, special and struck juries, the Judicial Council recommends the following:

1. Repealing Civil Practice Act section 449, establishing struck juries.

2. Repealing Judiciary Law section 749-a through section 749-e, governing the striking of a jury, and sections 749-f and 749-g, governing mode of obtaining a foreign jury.

3. Repealing Judiciary Law section 538-a, providing that the sheriff shall notify jurors drawn for a struck jury.

4. Amending Laws of 1895, chapter 369, by repealing section 48, providing that the commissioner of jurors of Erie county shall preside at the striking of a jury.

5. Amending Laws of 1904, chapter 232, by repealing section 28, providing that the commissioner of jurors of Westchester county shall preside at the striking of a jury.

6. Amending Laws of 1897, chapter 346, section 22, as amended by Laws of 1900, chapter 565, by removing the words 'struck' and 'special' from the provision

[12] This conclusion has also been reached by the Massachusetts Judicial Council, which, in studying the matter determined that special petit juries are unnecessary. Tenth Report of the Massachusetts Judicial Council, Nov. 1934, p. 44-46

that in Monroe county 'Nothing herein shall abridge or interfere with the power of the court to summon talesmen, struck, special or additional jurors * * *.'

7. Amending Laws of 1902, chapter 564, providing for a commissioner of jurors and for special jurors in Kings county by repealing sections 8-15, inclusive, governing the choice of special jurors. These sections should be repealed in any event since Kings county is now included in the provisions of Laws of 1901, chapter 602, as amended by Laws of 1920, chapter 112.

8. Amending Laws of 1901, chapter 602, establishing for certain counties, commissioners of jurors and special juries, by repealing sections 2 through 9 governing special juries, as amended by Laws of 1904, chapter 458; Laws of 1918, chapter 587; Laws of 1920, chapter 112; Laws of 1923, chapter 742."

Fourth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 48, 1938), pp. 46-48:

"Abolition of Special Juries

The Judicial Council has been attempting to improve the general jury system to such a point that extraordinary juries of any kind will no longer be necessary. To this end, the Council recommended women jurors, limitations on jury exemptions, and the abolition of struck, foreign and special juries, all of which recommendations were put into effect, except the abolition of special juries. Upon reconsideration and further study, the Council renews its recommendation for the abolition of special juries. These, popularly known as "blue ribbon" juries, are confined to the counties of New York, Bronx, Kings, Queens and Westchester.

The special jury, although designed to provide more intelligent and capable jurors in exceptional cases, both civil and criminal, does not necessarily bring about the

desired result. The jurors composing it are chosen from the ordinary jury list. The only method of choice distinguishing special from ordinary jurors is a personal interview of each special juror with the Commissioner of Jurors. The questions put by the Commissioner of Jurors to the prospective special jurors to determine their eligibility are similar to those usually put to an ordinary juror by counsel.

A more serious charge than its uselessness has been levelled at the special jury. It has been suggested that, by a process of eliminating jurors who have previously served on a special jury which has ended in acquittal or disagreement, special juries are particularly chosen to be convicting juries. Data gathered by the Judicial Council on the use of special juries during the five-year period July 1, 1932 to June 30, 1937, in the counties of New York, Bronx, Kings and Queens, indicate that special juries are prone to convict. During the period studied, of 383 defendants tried before special juries, 78 per cent were convicted and 22 per cent were acquitted. It should be noted that in the 383 cases, only five defendants demanded a special jury. In all other cases, the application was made by the people.

To compare the special with the ordinary juries, a study was made of all homicide cases, except those involving negligence or automobiles, tried during 1933 and 1934. The percentage of convictions to acquittals was much higher in cases tried by special juries than in cases tried by ordinary juries. During the calendar year 1933, of the 47 defendants tried for homicide before special juries 83 percent were convicted and 17 percent were acquitted. During the same period, of 156 defendants tried for offenses of the same grade by ordinary juries, 43 percent were convicted and 57 percent were acquitted. In 1934, of 72 defendants tried before special juries, 82 percent were convicted and 18 percent were acquitted, while of 191 defendants tried by ordinary juries, 37 percent were convicted and 63 percent were acquitted (see Table II below).

It is significant also that the percentage of defendants pleading guilty to a lesser offense was much higher in cases to be tried before special juries than those to be tried by ordinary juries. In 1933, for example, 26 percent of 47 defendants to be tried before special juries and only 9 percent of the 156 defendants to be tried before ordinary juries pleaded guilty to a lesser offense. In 1934, 39 percent of 72 defendants and 2 percent of 191 defendants to be tried before special and ordinary juries respectively, pleaded guilty to lesser offenses. Thus, defendants to be tried before special juries seem to realize that their chances of complete acquittal are much less than if they were to be tried before ordinary juries.

The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases.

The tables of data from which the above information is taken follow:

I

Disposition of Criminal Cases in Which Special Juries Were Ordered in the Counties of New York, Bronx, Kings and Queens July 1, 1932-June 30, 1937

County	Defendants	Convicted offense charged	Convicted lesser offense	Pleaded guilty	Total convicted	Acquitted, indictment dismissed, discharged from custody
New York	202	61 30%	28 14%	62 31%	151 75%	51 25%
Bronx	43	20 47%	1 2%	16 37%	37 86%	6 14%
Kings	103	45 44%	17 17%	23 22%	85 83%	18 17%
Queens	35	5 14%	7 20%	14 40%	26 74%	9 26%
Totals	383	131 34%	53 14%	115 30%	299 78%	84 22%

II

Disposition of Homicide Cases Other Than Those Involving Negligence or Automobiles in the Counties of New York, Bronx, Kings and Queens January 1-December 31, 1933 and January 1-December 31, 1934

	Special Jury				Ordinary Jury*			
	1933		1934		1933		1934	
	No.	%	No.	%	No.	%	No.	%
Defendants	47		72		156		191	
Convicted, offense charged	17	36%	15	21%	53	34%	67	35%
Convicted lesser offense	10	21%	16	22%				
Pleaded guilty to lesser offense	12	26%	28	39%	14	9%	4	2%
Total convicted	39	83%	59	82%	67	43%	71	37%
Acquitted, indictment dismissed, discharged from custody	8	17%	13	18%	89	57%	120	63%

* Figures obtained from Department of Correction.

Fifth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 48, 1939), p. 42)

"Abolition of Special Juries

In the Fourth Annual Report of the Judicial Council it was stated:

> 'The Judicial Council has been attempting to improve the general jury system to such a point that extraordinary juries of any kind will no longer be necessary. To this end, the Council recommended women jurors, limitations on jury exemptions, and the abolition of struck, foreign and special juries, all of which recommendations were put into effect, except the abolition of special juries. Upon reconsideration and further study, the Council renews its recommendation for the abolition of special juries.*
>
> 'The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases.'

The Council's Report pointed out in addition that the legal requisites prescribed for the special juries are substantially the same as the legal requisites prescribed for a general or ordinary jury.

In consequence, as might have been expected, such a special juror inevitably feels superior and such a special jury system becomes distinctly un-American and not consonant with a trial by one's peers.

Those who have sought to retain the special jury for criminal cases in the four counties of New York, Bronx,

* Special juries are permitted only in the counties of New York, Bronx, Kings, Queens and Westchester. And although Westchester county under the law is entitled to have special juries, they are not used and no special jury panel exists there.

Kings and Queens, have insisted that there is a practical although perhaps no theoretical necessity for the special jury, inasmuch as the quality of the jurors serving on the general jury in the four counties in question has in the past been inadequate, principally because the requirements set forth by law have not been insisted upon. In other words, the defect was one not so much of law as of the administration or application of the law."

Sixth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 48, 1940), p. 197:

"Two important matters which have not been changed in this proposal require comment.

In regard to special jurors, it should be noted that their abolition is not recommended in this proposal. This, however, is not to be construed as in any way indicating a withdrawal from the Judicial Council's former position regarding special juries which the Council considers un-American and undesirable for the reasons set forth in previous Reports of the Council. (See Third Annual Report of the Judicial Council, p. 121; Fourth Annual Report of the Judicial Council, p. 46; Fifth Annual Report of the Judicial Council, p. 42.)"

Eighth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 16, 1942), pp. 39-41:

"Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens

Since 1937 the Judicial Council has been recommending the abolition of special juries as undesirable and un-American. (Third Report, pp. 34, 121-128; Fourth Report, pp. 46-48; Fifth Report, p. 42.) In 1941 the Legislature by Chapter 402, abolished special juries in the counties of Westchester—population 569,422—and Nassau

—population 404,888—(see *supra*, page 24). Thus, special juries at present exist only in the counties of New York, Bronx, Kings and Queens. In its Fourth Annual Report the Council stated (page 47):

> 'The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases.'

The goal of a higher calibre of jurors *has now been achieved* under the new method of jury selection for the city of New York which went into effect September 1, 1940 upon recommendation of the Judicial Council and which now applies to *all* jurors those high standards which formerly were required only of special jurors.

The Judicial Council therefore again renews its recommendation for the abolition of special juries because:

a. The need in certain cases for better jurors was in the past the only valid objection to the abolition of special jurors. This objection, as stated above, has now been entirely overcome.

b. The undesirable features of a special jury are still present.

Some opponents of the Council's recommendation have now conceded that the Council's position is well taken. The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York in its 1940 Reports, Memo. No. 65, page 169, withdrew its former opposition and stated:

> 'In a previous report * * * this committee disapproved a bill (S. P. 180, * * *; A. Pr. 210, Int. * * *) seeking to abolish the blue ribbon jury. The basis of this action was that the reform of the methods of selecting jurors is a prerequisite to the elimination

of the blue ribbon system. The enactment of the bill under consideration [putting into effect the new jury system] would satisfy this condition and would eliminate the chief basis of the committee's action with regard to S. Pr. 180, A. Pr. 210. In such event, the committee would approve S. Pr. 180, A. Pr. 210."

Similarly, some of the officials most directly concerned had conceded that objection to the abolition of special juries would be met if all jurors were selected according to the provisions of the Judiciary Law with attention to the qualifications and disqualifications as therein set forth.

Not only is this now the case but the requirements for an acceptable juror have been made much more stringent than heretofore. Each prospective juror is searchingly examined and his qualifications carefully checked. The new system of jury selection is based on the best business-like and up-to-date administrative methods.

The Judicial Council has been advised by the four county clerks of the counties concerned that all jurors now serving and available for service have been qualified and examined under the new system. The Council has further been informed by the county clerks, as well as by others in a position to know, that the calibre of general jurors has greatly improved since the establishment of the new system.

Special juries are now practically confined to the trial of murder charges. From July 1, 1932 to June 30, 1941 every application for a special jury was made by the people.

It has been said that the abolition of special juries will result in too great a loss of time at the trial of actions where the crime charged is punishable by death, by reason of the possible drawing of jurors opposed to capital punishment. This matter, however, has been taken into account under the revised jury system in section 597 of the Judiciary Law which reads as follows :

'§ 597. Juror with scruples against death penalty. No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of murder in the first degree. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.' (Added L. 1940, ch. 202, effective Sept. 1, 1940.)

This section applies to all trial and grand jurors throughout New York City and was included specifically to save time in the examination of jurors by attorneys. It has proven successful in Richmond County, which has no special jurors."

Ninth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 20, 1943), p. 47:

"Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens.

The Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for which provision now exists only in the counties of New York, Bronx, Kings and Queens, be abolished as unnecessary and undesirable.

In its previous reports the Judicial Council has set forth at length the reasons for its recommendation (see Judicial Council Eighth Annual Report, pages 39-41; Fifth Annual Report, pages 42-43; Fourth Annual Report, pages 46-48; Third Annual Report, pages 34 and 121-128, to which the Council refers for facts and figures).

The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York, which until 1940 had opposed this recommendation, has with

commendable open-mindedness now approved the Council's recommendation, stating in its Memo No. 71 for 1942,

> "We now believe with the Judicial Council (Eighth Annual Report 1942, p. 39) that
>
> 'The goal of a higher calibre of jurors *has now been achieved* under the new method of jury selection for the City of New York which went into effect September 1, 1940 upon recommendation of the Judicial Council and which now applies to *all* jurors those high standards which formerly were required only of special jurors.'
>
> "This Committee has been aware of some of the less desirable aspects of the so-called blue ribbon jury. Since our main opposition to abolition has been removed by the present provisions of the law regarding the selection of all jurors, this bill is approved."

Tenth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 15, 1944), pp. 41-42:

"Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens

The Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for which provision now exists only in the counties of New York, Bronx, Kings and Queens, be abolished as unnecessary and undesirable.

In its previous Reports, the Judicial Council has set forth at length the reasons for its recommendation (see Judicial Council Eighth Annual Report, pages 39-41; Fifth Annual Report, pages 42-43; Fourth Annual Report, pages 46-48; Third Annual Report, pages 34 and 121-128; to which the Council refers for facts and figures).

The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York, which until 1940 had opposed this recommendation, has now approved the Council's recommendation, stating in its Memo No. 71 for 1942,

"We now believe with the Judicial Council (Eighth Annual Report 1942, p. 39) that

> 'The goal of a higher calibre of jurors *has now been achieved* under the new method of jury selection for the City of New York which went into effect September 1, 1940 upon recommendation of the Judicial Council and which now applies to *all* jurors those high standards which formerly were required only of special jurors.'

"This Committee has been aware of some of the less desirable aspects of the so-called blue ribbon jury. Since our main opposition to abolition has been removed by the present provisions of the law regarding the selection of all jurors, this bill is approved."

Eleventh Annual Report of The Judicial Council of the State of New York (Legislative Document No. 15, 1945), pp. 49-50:

"Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens.

"The Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for which provision now exists only in the counties of New York, Bronx, Kings and Queens, be abolished as unnecessary and undesirable.

In its previous Reports, the Judicial Council has set forth at length the reasons for its recommendation (see Judicial Council Tenth Annual Report, pages 41-42; Ninth Annual Report, page 47; Eighth Annual Report, pages 39-41; Fifth Annual Report, pages 42-43; Fourth Annual Report, pages 46-48; Third Annual Report, pages 34 and 121-128, to which the Council refers for facts and figures).

The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York, which until 1940 opposed this recommendation, now approves it (Memo No. 71, 1942).

It is undisputed that the revised jury system for New York City recommended by the Judicial Council and in

operation since 1940 has succeeded in improving the quality of jurors generally by applying to all jurors the high standards which formerly were required only of special jurors.

Thus, the necessity for special jurors no longer exists."

Twelfth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 17, 1946), p. 53:

"Renewed Recommendations

In renewing its recommendations as to the matters immediately following, the Judicial Council has nothing new to add. It therefore merely lists the recommendations and refers to the comments contained thereon by indicating the complete references to the respective subjects in the prior Annual Reports of the Judicial Council.

While these recommendations are not again amplified, in order to avoid repetition, the Judicial Council continues to stress their significance and desirability.

1. Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens. (see Eleventh Annual Report, pp. 49-50; Tenth Annual Report, pp. 41-42; Ninth Annual Report, p. 47; Eighth Annual Report, pp. 39-41; Fifth Annual Report, pp. 42-43; Fourth Annual Report, pp. 46-48; Third Annual Report, p. 34 and pp. 121-128)."

Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 377, 152

JOSEPH S. FAY and JAMES BOVE,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF FOR PETITIONER JOSEPH S. FAY

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Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 377, 452

JOSEPH S. FAY and JAMES BOVE,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF FOR PETITIONER JOSEPH S. FAY

I

Due Process.

A

Petitioner asserts that the principle that a jury must be "a body truly representative of the community" is a constitutional principle, one of the fundamental principles of liberty and justice which lies at the base of our civil and political institutions. Respondent denies this and claims that the principle has validity and can be applied only where this Court can exercise its power of supervision over the administration of justice in the Federal courts. Respondent claims that as far as due process of law is concerned, a state, or officials acting under its authority, may, with impunity, and without constitutional restraint, systematically, intentionally, and arbitrarily exclude from jury duty such classes and groups of people as they see fit.

It is significant, and against respondent's position, that the principle that the jury must be "a body truly representative of the community" was first stated, not in a case involving this Court's power to supervise the administration of justice in the Federal courts, but in a case involving the constitutionality, under the Fourteenth Amendment to the Federal Constitution, of a jury empanelled by the State of Texas (*Smith* v. *Texas,* 311 U. S. 128). Furthermore, in the next case in which the Court reiterated the principle (*Glasser* v. *United States,* 315 U. S. 60), the question had been raised under the Fifth and Sixth Amendments to the Federal Constitution.

But conclusive is the fact that the Court has now many times identified the necessity of the jury being "a body truly representative of the community" with "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", that is, with the substance of due process of law. "Our civil and political institutions" are democratic institutions. In *Smith* v. *Texas,* 311 U. S. 128, 130, the Court stated that a jury not truly representative of the community "is at war with our basic concepts of a democratic society and a representative government." In *Glasser* v. *United States,* 315 U. S. 60, 86, the Court stated that the proper functioning of "our democracy itself, requires that the jury be a 'body truly representative of the community' ". In *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 220, the Court stated that "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community", and that to disregard the fact that jury competence is an individual rather than a group or class matter "is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury".

It is inconceivable that there could be a more forceful and direct identification of the principle that the jury be

a body truly representative of the community with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions.

Respondent argues (brief, p. 21) that petitioner can make no claim of denial of due process because he cannot show actual bias on the part of the jury which tried him. The argument is without substance. While petitioner does not for a moment concede that he was tried by an impartial jury, or that a jury chosen from a panel composed primarily of bankers, manufacturers, stock brokers and the like, and a few "civic conscious" women, could possibly be impartial to him, it is nevertheless clear that there is no burden on petitioner to show the existence of "actual bias" on the part of the jury which tried him. Petitioner was entitled to "an impartial jury *drawn from a cross-section of the community*". *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220). (Italics supplied.)

In the many cases (see petitioner's main brief, p. 17) in which this Court has reversed convictions of Negroes tried by juries from which Negroes were excluded it has never been held essential to prove, nor has there been proof, that the jurors who tried and convicted the petitioning defendants had any "actual bias". There is no reason whatever for a different rule where the right to a jury truly representative of the community is claimed under the due process clause. Indeed, this Court has many times held that actual prejudice is immaterial where a matter of procedural due process is concerned (see petitioner's main brief, p. 40).

Likewise in every other case where the right to a jury truly representative of the community has been raised and sustained by this Court (*Glasser* v. *United States*, 315 U. S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; *Ballard* v. *United States*, 67 S. Ct. 261; *Zap* v. *United States*, October Term, 1945, No. 489, decided March 3, 1947), the Court has never considered it material whether or not the jurors who tried the defendant were "actually biased". To the contrary, in *Ballard* v. *United States*, *supra*, the Court

stated, at page 265: "But reversible error does not depend on a showing of prejudice in an individual case", and in *Thiel* v. *Southern Pacific Co., supra,* the Court, in reversing the judgment on the ground of the exclusion from the jury of laborers working for a daily wage, stated at page 225: "It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class".

The cases cited by respondent (brief, p. 21) in support of the proposition that petitioner's claim under the due process clause is dependent on a showing of actual bias on the part of the jury which tried him are readily distinguishable.

In one of these cases, *Buchalter* v. *New York,* 319 U. S. 427, the petitioner's claim under the Federal Constitution was that some of the jurors which tried him were actually biased and that in consequence he was not tried by an impartial jury, in contravention of the due process clause of the Fourteenth Amendment. This Court, in rejecting the claim, stated (p. 430): "We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established." In other words, all that the Court decided was that the petitioner had failed to prove the fact which he asserted raised the constitutional question, namely, actual bias on the part of the jury which tried him.[1] The same is true of the other case

[1] Respondent cites the *Buchalter* case (brief, p. 3) as authority for the statement that Section 749-aa of the *Judiciary Law* of the State of New York "has been said to present 'no due process question requiring review by this court.'" The Court did state at page 430 of the *Buchalter* case: "Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury, such assertion raises no due process question requiring review by this court." It is important then to see just what injustice Buchalter claimed Section 749-aa to have worked. It was this: Subdivision 7 of that statute (see petitioner's main brief, Appendix A, p. 5) provides that the trial court's rulings on any challenge of a special juror for actual bias shall be final. Buchalter did not object to his trial before a special jury and it was contended against him that he thereby waived his right to object to the provisions of subdivision 7. Buchalter, on

cited by respondent, *Spies* v. *Illinois*, 123 U. S. 131. Nor do *Brown* v. *New Jersey*, 175 U. S. 172, and *United States* v. *Wood*, 299 U. S. 123, cited in respondent's brief at page 21, support respondent's position. In the *Brown* case, decided in 1889, the petitioner apparently argued that a particular New Jersey statute authorizing the empanelling of struck juries was unconstitutional on its face. The Court found that the manner of selection of jurors provided by the particular statute seemed, on its face, one calculated to secure an impartial jury and sustained the statute. In *United States* v. *Wood*, the question was the constitutionality, under the Sixth Amendment, of an act of Congress making Federal employees eligible for jury duty in criminal cases. The Court sustained the constitutionality of the Act, holding that an absolute disqualification of governmental employees to serve as jurors in criminal cases was not essential to the impartiality of the jury guaranteed by the Sixth Amendment.

B

There can be no dispute that there are no standards set forth in Section 749-aa of the *Judiciary Law* of the State of New York to govern the officials of the Division of Jurors in the selection of special jurors. While respondent refers (brief, p. 4) to some of the statutory disqualifications for special jury duty as "standards", these disqualifications also apply to general jurors (see *infra*, pp. 12-15). The head of the Division of Jurors was frank to admit that

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the other hand, claimed that he could not waive his right to be tried by a jury free of actual bias. However, both this Court and the Court of Appeals, as indicated above, went directly to the merits of Buchalter's claim and found no evidence of actual bias on the part of Buchalter's jury. Accordingly, subdivision 7 of Section 749-aa of the *Judiciary Law* was found to have worked no injustice requiring review by this Court. None of the questions raised by the present petitioner were, or could be, raised by the petitioners in the *Buchalter* case.

there were no rules governing him and his subordinates in the selecting of special jurors (R. 41, 52).

Thus we find that respondent argues (brief, pp. 4-5) that the matter of standards is mere trivia, that "no constitutional question would have been presented even if the statute had failed to set up any standards, but had left the matter of jury selection entirely to the discretion of the deputy county clerks." Of course there is no support in the cases cited by respondent (brief, p. 5) for this negation of the rule of government by and under law. In *Murray* v. *Louisiana*, 163 U. S. 101, the complaint was that "judicial powers" were conferred on the jury commissioners, and evidently the point was argued only under the equal protection clause of the Fourteenth Amendment, for the Court answered the petitioner's complaint as follows (163 U. S. 108): "It is not pretended that the accused was subjected to any other or different treatment, in respect to that feature of the statute, than that which prevails in other cases, or in the trial of white citizens." In any event, it is not a "judicial power" in the Division of Jurors of which the present petitioner complains: it is an arbitrary power not controlled by any rule, judicial, legislative, or otherwise. In *Franklin* v. *South Carolina*, 218 U. S. 161, the Court found the standards governing the jury commissioners adequate.

In *Akins* v. *Texas*, 325 U. S. 398, it appeared that while the Texas Criminal Code set forth very meticulous standards under which grand jurors must qualify, the names of jurors to serve on a particular grand jury were not drawn by lot from the list of qualified grand jurors, but were selected by the jury commissioners from that list. The Court of its own motion remarked (p. 403) that "This method of selection leaves a wide range of choice to the commissioners," but dropped the question with the note that petitioners did not complain of the practice. *Williams* v. *Mississippi*, 170 U. S. 213, another case cited by respondent in support of the proposition that standards for administrative action are superfluous, has no bearing on the problem.

Apart from the question of whether there is anything in Section 749-aa of the *Judiciary Law* to govern the discretion of the officials of the Division of Jurors in selecting special jurors, the indisputable fact is that these officials did act arbitrarily and capriciously in selecting the panel of special jurors from which petitioner's jury was drawn. They arbitrarily and unreasonably excluded from special jury duty the 90% of those summoned for jury duty who followed the mandatory direction to name preferred months of service;[2] they arbitrarily and unreasonably excluded all laborers, operatives, service employees, and virtually all craftsmen and foremen; they arbitrarily and unreasonably excluded women, particularly those not members of so-called "civic conscious" organizations.

II

Equal Protection.

A

Respondent's explanation of the complete exclusion of laborers, service employees, and operatives from the panel from which petitioner's special jury was drawn, is that the officials of the Division of Jurors "excused" these people on the ground that jury service would be burdensome for persons of their occupation because of undue financial hardship (respondent's brief, pp. 16-17). Suffice it to say that the officials of the Division of Jurors made no such claim.

In any event, the wholesale exclusion of laborers, operatives, and service employees because of their wage scale

[2] By naming two preferred months of service in response to a direction to do so, the prospective juror does not, of course, indicate that he cannot serve in other months. Nor is there anything in the law which requires the Division of Jurors to give effect to the juror's choice of months. Respondent's claim (brief, p. 12) that it is impossible to predict during what season, or for how long, the special juror's services will be required, applies, for whatever it is worth, to general jurors as well.

would be discrimination against persons engaged in these occupations as such, and would not be justifiable without intention and effort to determine in advance whether the individual members of these occupations would suffer undue hardship in serving on the jury. (See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 224.)

B

Contrary to respondent's assertion (brief, pp. 7-8), petitioner does not contend that the special jury panel was brought into being to meet the exigencies of the present prosecution or for the purpose of prosecuting labor leaders and others similarly situated. Such a contention is no more necessary to petitioner's case than it was necessary for the petitioner in *Smith* v. *Texas*, 311 U. S. 128, to show that the jury panels from which Negroes were excluded were drawn solely for the trial of Negroes.

The District Attorney of New York County states that his office, "which should have been in a position to make accurate judgment of the matter," has been responsible for the trial of several wealthy defendants before special juries and concludes therefrom that the special jury panel is not subject to criticism (respondent's brief, pp. 8-9). But what the District Attorney's office knows is not solely that special juries are prone to convict laboring people and their representatives. What the District Attorney's office knows is that special juries are prone to convict. It has the official reports of the Judicial Council of the State of New York showing that special juries are much more prone to convict defendants in criminal cases than are ordinary juries (see petitioner's main brief, Appendix D, pp. 42-45). That it has acted on the judgment thus formed is evident from the fact that the Judicial Council reported in 1942 that every application for a special jury in the period

July 1, 1932 to June 30, 1941, was made by the prosecution (see petitioner's main brief, Appendix D, p. 49).[3]

It is not a part of petitioner's position to contend that special juries will not convict a propertied defendant any more than it was necessary for petitioner in *Smith* v. *Texas*, 311 U. S. 128, to contend that juries from which Negroes were excluded would never convict white defendants. What petitioner does contend on this phase of the case is that he went to trial with three strikes against him in being forced to be judged by a jury drawn from a panel composed of persons whose interests and habits of thought are hostile to labor and its representatives, and who, from training or otherwise, have acquired a bias in favor of the prosecution.

C

It is significant to compare respondent's statement that it was a matter of indifference to the prosecution whether or not petitioner's jury was partially or predominantly made up of laboring men (brief, p. 25) with the fact that at the trial, the District Attorney peremptorily challenged, with two readily understandable exceptions, every one of the talesmen whom respondent lists in the footnote to its

[3] As indicated by the official statistics issued by the County Clerk of New York County (see petitioner's main brief, footnote, p. 8), there is but little change in the personnel of the special jury panel from year to year. In this case, talesman Harry H. Coon, central office manager for Holmes Electric Protective Company, testified that he had served on the special jury for 20 years (R. 156, 158); Alexander C. Patterson, Jr., contractor, testified that he had served as a special juror "probably fifty times" (R. 131, 137); Alonzo Walling, insurance underwriter until his retirement, testified that he had been on the panel for 10 or 12 years (R. 258, 260); Guy R. Jenkins, insurance broker, testified that he had been on the panel "for a long time" (R. 235, 236), and Mancius H. Hutton, a laboratory engineer prior to his retirement, testified that he had been on the panel "for quite a number of years" (R. 244-246).

brief on page 19 as having been former or present union members.[4] The first exception was Harvey W. Frank. Mr. Frank, a Civil Engineer, and a graduate of New York University, had been for one of the early 17 years for which he had worked for the New York Telephone Company, a member of some company-sponsored organization concerning which he testified "I don't know whether you would call this a labor union or not" (R. 94, 97-98, 101). More significantly, Mr. Frank admitted that he had certain opinions concerning labor unions and labor union officers (R. 99). While the Trial Court sustained objections by the District Attorney to questions seeking to elicit the precise character of these opinions, it was evident from the answers which were given, that such "prejudice" (R. 99) as the talesman had were favorable to the prosecution. The other exception is Junius H. Smith, the gentleman referred to in petitioner's main brief (pp. 14-15), who, at the age of 69, had retired from the Treasury Department of Union Carbide and Carbon Corporation and had gone to work with Brooks Brothers where he joined a union the name of which he did not know and which he joined because Brooks Brothers had told him that "everybody had to belong to the union" (R. 353-354).

In other words, it was perhaps but a salve to conscience for the District Attorney to tell the jury, once the jury had been finally selected how "the twelve truest friends that labor ever had" would have decided the case (see respondent's brief, p. 25).

D

Respondent states (brief, p. 12) that it would only give rise to "useless irritation" to compel "unwilling women" to

[4] None of these persons were, at the time of the trial, laborers, operatives, service employees, or craftsmen (R. 94, 113, 149, 224, 263, 309, 353-354), and respondent's statement (brief, p. 18) that they represent "the type of worker under discussion" accordingly finds no support in the record. Against these persons the prosecution exercised five of its seventeen peremptory challenges (R. 123, 155, 227, 265, 312).

present themselves for examination for jury duty. But the difficulty is that here there was no effort, no intention, to determine in advance whether individual members of the female sex were "unwilling" to serve as jurors. As was the case with the daily wage earning class in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 224, "All were systematically and automatically excluded."

If it be an "irritation" to send notices to women to appear to be examined for jury duty, then it is not, as respondent states, a "useless irritation." Rather, it is the very kind of irritation that is necessary to uphold the American tradition of trial by jury. *Ballard* v. *United States*, 67 Sup. Ct. 261, *Zap* v. *United States*, October Term, 1945, No. 489, decided March 3, 1947.[5]

The exclusion of women from the panel intensified and made more effective the discrimination against labor on the panel. For with the exclusion of women, the wives and daughters of laboring men were excluded, and there was accordingly no representation directly or indirectly of the laboring classes on the jury panel (compare *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 222).

E

The case of *Rawlins* v. *Georgia*, 201 U. S. 638, upon which respondent relies, has no bearing whatever on the present case. It was found in the *Rawlins* case that lawyers, ministers, doctors, dentists, railroad engineers, and railroad firemen were excluded from jury service, on the ground that it was for the good of the community that their work should not be interrupted. Petitioner does not argue that a jury must contain representatives of every occupation in order to satisfy the principle that the jury must be a body truly representative of the community. What petitioner does claim is that the intentional, discriminatory,

[5] Since this latter decision there can be no doubt that a man can validly complain of being tried by a jury from which women are excluded.

and irrational exclusion of laborers, operatives, service employees, craftsmen, and foremen, some 58% of the male working population of New York County, and women, was in flagrant disregard of that principle and requires reversal of the judgment appealed from.

F

As pointed out at length in petitioner's main brief (pp. 26-29), the special jury panel differs radically from the general jury panel in New York County in that laborers, operatives, service employees, craftsmen and foremen are not excluded from the general jury as they are from the special jury; in that the discrimination against women is intensified in selecting special jurors as distinguished from general jurors; in that special juries are much more prone to convict defendants in criminal cases than are general juries.

Petitioner accordingly asserts that in being forced to go to trial before the special jury he was denied the equal protection of the laws since there is no justification whatever for empanelling the special jury as distinguished from the general jury.

As petitioner pointed out (main brief, pp. 29-33), all the qualifications for special jury duty are also necessary qualifications for general jury duty. The officials of the Division of Jurors testified that intelligence was the important qualification for special jury duty, and intelligence is by statute a necessary qualification for a general juror.

Respondent lists (brief, pp. 3-4) certain statutory disqualifications for special jury duty which it claims justified the trial of petitioner before a special jury as distinguished from a general jury. Since each of these disqualifications for special jury duty is also a disqualification for general jury duty, respondent's claim is specious.

Each prospective juror in New York County answers one and the same questionnaire, regardless of whether he ultimately becomes a general or special juror. This question-

naire includes questions designed to test the eligibility of the juror for special jury duty. However, since these questions are also fundamental to eligibility for duty on any jury, they are applicable to all prospective jurors alike.

While the statute (*Judiciary Law*, § 749-aa, subsection 2, see petitioner's main brief, Appendix A, pp. 1-2), sets forth some ten disqualifications for special jury duty, the head of the Division of Jurors testified that only two of these had any particular bearing on eligibility for special jury duty (R. 46).

One of these disqualifications appears as the second part of Question No. 26 on the questionnaire (Defendant's Exhibit D-1, R. 508A): "Have you such views concerning the death penalty as would prevent you from finding a defendant guilty if the crime charged be punishable by death?"

A prospective juror who answers this question in the affirmative cannot be accepted as a special juror, and at one time it could be contended that a possible saving of time resulted in murder cases tried by a special jury. However, with the amending of the *Judiciary Law* of the State of New York in 1940, this possible justification for the special jury system disappeared completely. As the Judicial Council of the State of New York stated in its *Eighth Annual Report* (see petitioner's main brief, Appendix D, pp. 49-50), concurrent with its continued recommendation that special juries be abolished:

> "It has been said that the abolition of special juries will result in too great a loss of time at the trial of actions where the crime charged is punishable by death, by reason of the possible drawing of jurors opposed to capital punishment. This matter, however, has been taken into account under the revised jury system in section 597 of the Judiciary Law which reads as follows:
>
> "'par. 597. Jurors with scruples against death penalty. No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has

stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of murder in the first degree. Such scruples shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.' (Added L. 1940, ch. 202, effective Sept. 1, 1940).

"This section applies to all trial and grand jurors throughout New York City and was included specifically to save time in the examination of jurors by attorneys. It has proven successful in Richmond County, which has no special jurors."

It is accordingly certain that there is nothing in the disqualification covered by the second part of Question No. 20 on the questionnaire to justify the insidious and discriminatory special jury system.

The only other statutory disqualification for special jury duty which the head of the Division of Jurors stated (R. 46) was of any particular pertinence in selecting special jurors, was the disqualification covered by the second part of Question No. 21 on the questionnaire (Defendant's Exhibit D-1, R. 508 A): "Do you doubt your inability to lay aside opinions or impressions, the result of newspaper reading or hearsay, and render an impartial verdict upon the evidence?"

The head of the Division of Jurors testified (R. 56): "Of course, if there are glaring errors in the questionnaire, he (the prospective juror) is not accepted at all as a juror to serve anywhere". It is obvious that "inability to lay aside opinions or impressions, the result of newspaper reading or hearsay, and render an impartial verdict upon the evidence" is the very kind of "glaring error" which the head of the Division of Jurors testified would disqualify

one from any kind of jury duty. If not, then it is certain that it should be.[6]

G

The case of *Hall* v. *Johnson*, 186 U. S. 480, cited in the addendum to respondent's brief, did not decide any question before the Court in the present case. Hall claimed

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[6] The questionable value of such a general question as the second part of Question No. 21 is demonstrated by the fact that 21 of the talesmen examined on the *voir dire* in this case, who presumably had answered the second part of this question in the negative in order to qualify for the special jury panel, were excused because of their admitted inability to lay aside opinions concerning the present case, the result of newspaper reading or hearsay, and to render an impartial verdict upon the evidence in this case. The following talesmen testified that they had opinions unfavorable to labor or the representatives of labor which they could not lay aside: Howard Berusch, manufacturer (R. 230-231); Bertram A. Mayer, manufacturer (R. 300-302); John W. Weber, Jr., vice-president of manufacturing corporation (R. 261-262); Newbury F. Read, real estate broker (R. 213-214); Henry L. Goetz, wholesale jeweler (R. 211-213); James E. Morrow, industrial promoter and financier (R. 333-335); Richard S. Brautigam, sales promotion and advertising man with the American Can Company (R. 138, 143-144); Murrill W. Reddick, salesman (R. 286-288). The following talesmen testified that they could not lay aside opinions unfavorable to petitioner gained from reading articles written by Westbrook Pegler: Allen B. Kendrick, stock broker (R. 247-249); Norman S. McMillian, stock broker (R. 305-306); Lawrence L. Oppenheimer, sales supervisor for Philip Morris & Company (R. 273-275); Charles A. Livingston, advertising business (R. 277, 281); Phil A. Alexander (R. 252); see also, Guy R. Jenkins, insurance broker (R. 235, 238, 239). The following talesmen testified that they could not lay aside opinions concerning the case gained from reading about it: Robert B. Brown, assistant vice-president Bristol Myers Company (R. 294-295); James M. Geraghty, art editor, New Yorker Magazine (R. 326-327). The following testified that they had opinions concerning the case which might prejudice one side or the other: Victor H. Scales, public relations counsel (R. 304); Charles E. Seitman, salesman (R. 318, 319); Bertrand P. English, sales and merchandise manager (R. 327-328); Mildred Simon, with ladies' accessory company (R. 341); John W. Witherington (R. 342); Augustus E. Lewis testified that he had definite views about labor which he could not set aside (R. 335). See also Guy R. Jenkins, insurance broker (R. 235, 238, 239).

that by virtue of being tried by a special jury he was treated differently than defendants in some other criminal cases. But that was all he claimed; and it is fundamental that a mere claim of different treatment raises no constitutional question, and that the Legislature may treat various groups and classes of people differently unless it is shown that there is no rational justification for the different treatment. The present petitioner has claimed and shown, as the petitioner in the *Hall* case did not, that there is no justification for the empanelling of a special jury as distinguished from a general jury, and that his trial before the special jury was unwarranted, discriminatory, prejudicial, and a denial of the equal protection of the laws.

A second substantial difference between the *Hall* case and the present case is the fact that the relationship between the general and special jury systems at the time of the *Hall* case was radically different than the relationship of the two systems at the time of petitioner's trial. Petitioner has shown that there is no justification for the special jury system since the qualifications for general and special jury duty are now substantially the same. But it could not be said that the qualifications were substantially the same at the time of Hall's trial.[7] For example, to qualify for special jury duty at the time of Hall's trial, one had to have been a citizen of the United States for at least ten years. To qualify for general jury duty the length of citizenship was immaterial. To qualify for special jury duty, one had to be at least thirty years of age; to qualify for general jury duty, one had to be only twenty-one years of age or more. To qualify for special jury duty, one could have no scruples against the imposition of the death penalty; there was no such disqualification from general jury duty. To qualify for special jury duty, one had to show that he had not been convicted of a criminal offense;

[7] Compare Laws of 1896, ch. 378, the law then relating to special jurors, with Section 1079 of the New York Code of Civil Procedure, the law then relating to general jurors.

this was not a qualification *for general jury duty*. To qualify for special jury duty, one had to have "approved integrity" and "sound judgment"; these virtues were not qualifications for general jury duty. These differences in the qualifications of special and general jurors at the time of Hall's trial *have since been abolished*. As the Judicial Council of the State of New York has pointed out (see petitioner's main brief, p. 31), the method of jury selection now in effect "applies to *all* jurors those high standards which were formerly required only of special jurors".

Finally, it seems clear that this Court did nothing more in the *Hall* case than to decide that the remedy sought to be invoked, habeas corpus, was improper, and that petitioner should have proceeded by writ of error. All but one case cited in the Court's *per curiam* opinion is to that effect, and the case of *Brown* v. *New Jersey*, 175 U. S. 172 (*supra*, p. 5), is not responsive to any claim of denial of the equal protection of the laws.

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1946

Nos. 377, 452

JOSEPH S. FAY AND JAMES BOVE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN,
District Attorney,
New York County.

WHITMAN KNAPP,
JOSEPH A. SARAFITE,
Assistant District Attorneys,
Of Counsel.

September 1946.

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Proceedings Below

Petitioners were convicted of two separate crimes of CONSPIRACY and EXTORTION (Penal Law, §§ 580, 850, 851) by judgments of the Supreme Court, New York County, rendered on April 5, 1945 (70, 1141-2).* The judgments of conviction were affirmed, with prevailing and dissenting opinions, by the Appellate Division of the Supreme Court (1170-81; 270 App. Div. 261); and were unanimously affirmed, without opinion, by the Court of Appeals (1185-7). The proceedings in the courts below are, so far as here relevant, set forth at pages three to six of the petition of Joseph S. Fay (hereinafter referred to as "the petition").

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* Unless otherwise indicated, references are to pages of the printed record.

Nature of the Prosecution

The petitioners Fay and Bove were vice-presidents, respectively, of the International Union of Operating Engineers and of the International Hod Carriers, Building and Common Laborers Union of America. The indictment, containing one misdemeanor conspiracy count and six felony extortion counts, charged the petitioners with conspiring to extort over $700,000, and with the actual extortion of over $400,000, from persons engaged in the construction of the Delaware Aqueduct—an integral part of New York City's water supply system.

Payments to the petitioners totalling over $300,000 were established by the evidence. Petitioners did not take the witness stand in their own behalf. Through counsel, they conceded personally receiving the monies in question, but contended that the payments had constituted bribery rather than extortion (945-6; see 985). The trial court—in a charge to which no exception was taken and which "constitutes the law of the case" (*People* v. *Lewis*, 238 N. Y. 1, 5)—thus stated the issue presented to the jury (1061):

> "Was the money paid as a bribe, willingly, for services which the contractors expected to receive? Or was it paid over by threats which the defendants conveyed to the contractors? That is the sole issue in this law suit."

Upon the narrow—and concededly unpopular (Fay's summation, 946)—defense thus interposed, the jury acquitted the petitioners on three of the substantive felony counts submitted to it, disagreed on a fourth, and convicted upon the general conspiracy count and one felony count involving a $62,000 payment (1097-9).

Questions Presented and the Respondent's Position

The jury which thus convicted the petitioners was drawn from a "List of special jurors" numbering about three thousand persons selected in the manner prescribed in Section 749-aa of the New York Judiciary Law (see Appendix to the petition, pp. 17-22). The sole argument now advanced is that "women and laborers were largely, systematically, and intentionally, excluded" from this list of special jurors and that in consequence, the list was so "heavily weighted in favor of the economically and socially privileged" that any trial before a jury drawn therefrom must necessarily have denied the petitioners equal protection of the laws and due process of law in violation of the Fourteenth Amendment (see "Question presented," petition, p. 2; also pp. 13, 14).

It is the respondent's position that the record not only fails to disclose discrimination against any class or category of persons but that it affirmatively establishes its absence.[1]

Statutory Provisions Concerning General and Special Jurors; and Their Application to the Case at Bar

In all counties of the State of New York having a population of one million or more inhabitants, two lists of trial jurors are provided by statute: a general list, and a "List of special jurors" selected from "persons qualified to serve as trial jurors" (Judiciary Law, § 749-aa, subd. 1). In New

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[1] The question whether discrimination along economic lines would raise constitutional problems similar to those presented by the exclusion of jurors on account of race or color (*cf. Strauder v. West Virginia*, 100 U. S. 303, 310; U. S. C. Title 8, § 44) is not presented by the evidence in this case.

York County, the general list numbers about sixty thousand persons, and the special list about three thousand (82-3). Section 749-aa of the Judiciary Law, which relates exclusively to special jurors, is printed as an appendix to the petition (pp. 17-22). Sections 596, 597 and 599 of that law, which state the qualifications and exemptions of general jurors in the five counties comprising New York City are printed as an appendix to this brief (*infra*, pp. 21-23).

Qualifications of General Jurors

So far as here relevant, Section 596 of the Judiciary Law (*infra*, p. 21) provides that a trial juror must be between the ages of twenty-one and seventy; must be the owner of real or personal property of the value of $250, or be the spouse of such a person; must be intelligent, of sound mind and good character, well informed, able to read and write English, and "not infirm or decrepit"; and must never have been convicted of a felony or of a misdemeanor involving moral turpitude.

Section 597 provides that while persons having "conscientious scruples against the death penalty" may be placed on the general jury list, they may not serve in "a criminal action where the crime charged is or may be punishable by death."

Subdivision 7 of Section 599 gives women an absolute exemption from all jury duty.

Additional Qualifications of Special Jurors

So far as relevant to the instant case, Section 749-aa (subd. 2) excludes from the list of special jurors any person otherwise qualified for jury service who:

(a) "doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression"; or

(b) has such "opinion as to circumstantial evidence • • • as would prevent his finding a verdict of guilty upon such evidence"; or

(c) "avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense"; or who

(d) "avows that he cannot in all cases give to a defendant, who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal [so] to testify • • • shall not create any presumption against him."

In addition, Section 749-aa excludes from the special jury list any person who has been convicted of a criminal offense (even if it be a misdemeanor not involving moral turpitude); who has been found guilty of fraud or other misconduct by the judgment of any civil court; or who possesses conscientious scruples about the death penalty; or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation thereof.

Circumstances Under Which a Special Jury May Be Drawn

According to subdivision 4, Section 749-aa, applications for special juries are addressed to the discretion of the trial court, may be made by either side, and must be based on a showing that:

(a) "by reason of the importance or intricacy of the case, a special jury is required"; or

(b) "the issue to be tried has been so widely commented upon * * * that an ordinary jury cannot without delay and difficulty be obtained"; or that

(c) for any other reason "the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury."

Judicial Interpretation of the Special Jury Statute

Some form of special or "struck" jury has been provided by the statutes of New York ever since 1786 [see Laws of 1786, ch. 41, pp. 279-280; 2 Rev. Stat. (1829) p. 418, § 46; *People* v. *Tweed* (1876) 50 How. Pr. 262, 263]. The predecessor of the present statute was enacted in 1896 (Laws of 1896, ch. 378), and its provisions, so far as pertinent to the present proceeding, have not been materially changed since that date (*cf.* Laws of 1896, ch. 378, §§ 8, 13 with Judiciary Law, § 749-aa, subds. 2, 4).

Shortly after its enactment, the purpose and effect of this parent statute were authoritatively defined by the highest court of New York [*People* v. *Dunn* (1899) 157 N. Y.

528]. The Court of Appeals then declared (157 N. Y., at p. 532):

> "It must be perfectly apparent that the act has but the one direct object of facilitating the administration of justice in criminal cases, by providing for the impaneling of a fair, competent and impartial jury, without the difficulty and delay with which the procedure is so frequently attended."

This object was accomplished, the court declared, by investing the officials who select the special panel with the power and duty of eliminating "those who should not sit, or who would be disqualified from acting, in the criminal branch of the court, whether from the standpoint of the prosecution, or of the defendant" (157 N. Y., at p. 537).

The Application of the Foregoing Statutory Provisions to the Case at Bar

It is at once apparent from the record that any juror impanelled to try the instant case should have possessed all four of the statutory qualifications set forth at page 5, *supra*.

a. The extent to which the case had been commented upon in the press was established by affidavits and evidence produced by petitioners themselves (53, 140-6; Defts' Exh. D-3); and by a decision of the Supreme Court, New York County, granting petitioners' motion to remove the case from the Court of General Sessions on the ground, among others, that unusual publicity had been accorded the matter. The Supreme Court then observed (54; 48 N. Y. S. (2d) 2, 4):

> "The newspapers have not neglected these defendents. Fay, in particular, has been described in

terms neither complimentary nor doubtful. Some of the comments roundly condemn his organization, his associates and their practices."

It was therefore vital to eliminate any juror who doubted "his ability to lay aside an opinion or impression formed from newspaper reading * * *, or to render an impartial verdict upon the evidence uninfluenced by any such opinion or impression."

b. The basic charge of the indictment returned against the petitioners was that they were guilty of a general "conspiracy" to commit the crime of extortion (6-10). It is obvious that such a charge must ordinarily be proved by circumstantial evidence (see *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 612; *Glasser* v. *United States*, 315 U. S. 60, 80); and that no juror whose "opinion as to circumstantial evidence * * * would prevent his finding a verdict of guilty upon such evidence" would be competent to serve.

c. As already noted (*supra*, p. 2), the petitioners interposed a peculiarly unpopular defense of which, as Fay's counsel frankly recognized, a jury might well be expected to "disapprove," (946). It was therefore important that no juror be selected who harbored "such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense".

d. Neither petitioner took the witness stand in his own defense, which made it essential that the jury be composed of persons able to give them "the full benefit of the statutory provision that such * * * neglect or refusal to testify * * * shall not create any presumption against" them.

Evidence Concerning the Selection of General and Special Jurors

The petitioners relied exclusively upon the testimony of three witnesses to support the challenge to the array: Deputy County Clerks James McGurrin and Thomas F. Kane, who described the methods by which jury lists were prepared in New York County; and Warren H. Mayell, a lawyer associated with petitioner Fay's attorney of record, who produced a "survey" or chart (Defts' Exh. D-2) purporting to classify the 3,000 special jurors according to the occupations given by them in questionnaires (see Defts' Exh. D-1) filed at the County Clerk's office.

Procedure for Selecting the 63,000 Trial Jurors Comprising the General and Special Jury Panels

There are about 755,000 registered voters in New York County,[2] who constitute its principal source of trial jurors (85). The task of reducing this number to the required 63,000 special and general jurors is entrusted to the Division of Jurors of the County Clerk's office (81-2). The witness McGurrin is in charge of that Division (81). He is assisted by the witness Kane, conceded by the petitioners to be "eminently qualified" for his position (97); by three "examiners" (87, 89); and by an unspecified number of clerks.

Prospective jurors are summoned to the County Clerk's office by notices sent to persons taken from the voting registry, the census list, the tax lists, the telephone directory and from "any other available source" (85-6, 125)—the voting registry being the "most prolific source" (85). Upon arriving at the office, each prospective juror is given a comprehensive questionnaire (1146; Defts' Exh. D-1) which he

[2] World Almanac (1946), p. 523.

is required to complete at the office without assistance, his ability to do so intelligently being one of the principal tests of his suitability for jury service (86-8, 193). He is then taken before one of the examiners, who goes over the questionnaire, "perhaps asks some supplementary questions," and then determines whether he should be rejected as unsuitable for jury service, placed on the general list, or referred to one of the deputy county clerks as a prospective special juror (87-8; see *infra*, p. 11).

Women being entitled to an absolute statutory exemption (Judiciary Law, § 599, subd. 7; *infra*, pp. 22-23), a different initial procedure is followed in their case. It having been found impractical to compel women to appear for examination, notices are sent only to volunteers, or to those recommended by other women (125) or by various civic organizations—including the "League of Women Voters" (85). However, when a woman appears at the county clerk's office, she goes through precisely the same procedure as a man with respect to her availability both as a general or as a special juror (see 86, 95). In this manner, it has been possible to place "seven or eight thousand" women on the jury lists—despite the statutory exemption (113).[3]

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[3] In view of the great emphasis the petitioners place upon the "League of Women Voters" (petition, pp. 8, 12), it is interesting to note that this organization boasts only 2,162 members in New York County (information obtained at the office of the New York City League of Women Voters, 461 4th Avenue, New York 16, N. Y.). Therefore, even if we were to assume—without any supporting evidence—that the League had been successful in getting 100% of its membership registered for jury service, the record would still be a long way from suggesting that New York County's women jurors were taken "exclusively from its [the League's] membership" (see *Glasser* v. *United States*, 315 U. S. 60, 84). It may be of some significance that, of the three women examined on the *voir dire* (305-8, 357-62, 442-3), one was a former member of "The Teachers Union, Local 5[illegible] (307), and one was a "full-time Red Cross volunteer worker" who "occasionally" read *The Daily Worker* (358, 361). The latter was "satisfactory" to both sides and served on the jury (362).

The Selection of the "List of Special Jurors"

The "examiners" who see each prospective juror after his questionnaire is completed (*supra*, p. 10), are under instructions to be "on the lookout" for men and women who are "available for service any * * * month of the year" (93, 126; *infra*, pp. 11-12), and who "meet all the requirements of the Special Jury Law, and generally appear to be intelligent jurors" (89-93, 125-6). As such persons are found, they are referred to Deputy County Clerks McGurrin or Kane who "then examine them and decide whether or not to place them on the special jury list" (126; also 95).

In making this final decision, the deputy county clerks —like the examiners—are governed by a desire to find intelligent jurors who, among their other qualifications, will not be "influenced by the failure of [a] defendant to take the stand" or "prejudiced against any defense that the defendant might interpose," and who will "give every class of defendants" a "fair" and "proper" trial (127, 132; also 96, 103-4).

A talesman's availability for the special list is not dependent upon his or her formal education (106, 132), occupation or calling (106-7), or upon his or her place of residence—so long as that be within the county (107-10, 120). No person is ever placed on the special jury list as a result of recommendation by "any body, public or civic" (114).

The special jury list, a permanent rather than an annual compilation, is subject to constant revision by adding new names to take the place of jurors who move out of the county or otherwise become disqualified (112).

The "Select Wheel"

In the case of the general list, the county clerk—with the approval of the Appellate Division of the New York

Supreme Court—has established a system whereby jurors may select the months in which they can most conveniently serve, and be assured that they will not be called at any other time [12]-2; *cf. People* v. *Chrisoulas*, 367 Ill. 85, 88, 10 N. E. (2d) 382, 384].

To this end, the questionnaire (Defts' Exh, D-1)—which was "prepared by the Appellate Division" (121)—contains the following:

> "What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months)_____"

The name of any juror who states a preference is placed in a "select wheel" from which it can be drawn only during the months designated (121-2). Jurors expressing no preference are placed in a "general wheel" and are subject to call at any season (*id.*).

In the case of the special list (which numbers only 3000), it has been found impractical to establish such a "select wheel." As Mr. McGurrin testified, "we can't accept a special juror who can serve only certain months of the year," because "a special juror must be available at all times for service, any month" (115). Accordingly, jurors having a preference as to months of service are not placed on the special list (93, 115-7).[4]

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[4] Although the fact does not appear in the instant record, it is well known that special juries are frequently called in long and complicated cases in which the trial may not be completed until months after the court has ordered the drawing of the required number of special jurors. Thus, for example, in *People* v. *Schwartz*, 270 App. Div. 218, the drawing of a special panel was ordered on the 18th of October, 1943, the jurors then drawn were not—because of intervening adjournments—actually summoned to court until the 7th of February of the following year, and the verdict was not rendered until the 4th of April (*Schwartz* Record on Appeal, pp. 84-87); in *People* v. *Alexander*, 293 N. Y. 870, the corresponding dates were November 3rd, January 27th and March 28th (*Alexander* Record on Appeal, pp. 17-19); and in *People* v. *Rabenold*, 287 N. Y. 832, they were January 23rd, February 26th and March 19th (*Rabenold* Record on Appeal, pp. 43-44). It is obvious that no "select wheel" system could be operated under such conditions.

The Petitioners' "Survey"

The "survey" presented by the witness Mayell—upon the basis of which petitioner asserts that the special panel was "composed primarily of bankers, manufacturers, executives, stock brokers, and the like, in number wholly out of proportion to their numerical significance in the community as a whole" (petition, p. 9)—classified the jurors on the special list according to the "occupations" stated on their questionnaires (134).

This survey purported to give no information as to the positions held by the various jurors within their respective industries or occupational groups (136-8). No evidence was offered to indicate to what extent—if any—the occupational groups found on the special list were out of proportion to their representation in the county at large; nor is there evidence that the special list was, in this respect, any different from the concededly fair general panel.

ARGUMENT

No Substantial Question is Presented.

Petitioners contend that they have been deprived of due process and equal protection of the law under the Fourteenth Amendment, in that they were tried before jurors drawn from a panel selected in a deliberately discriminatory fashion. The discrimination, it is alleged, consisted in the selection of the "economically and socially privileged" to the exclusion of "persons of humble station in life," so that the panel became an instrument for protecting "the interests of capital," while oppressing "laboring men" and

their representatives (petition, pp. 2, 4, 13-15).[5] However,

[5] The utter absurdity of suggesting that the special panel has been deliberately weighted in favor of the "economically and socially privileged" can be seen by examining the cases in which the panel has been used. Of the seventeen reported non-capital cases arising in New York County since 1938, when the present law was adopted, only three concerned defendants claiming to be labor leaders or "persons of humble station in life" (*People* v. *Scalise*, 288 N. Y. 220; *People* v. *Elia*, 262 App. Div. 836; *People* v. *Bernoff*, 266 App. Div. 918), while twelve involved defendants whom the petitioners would necessarily classify as belonging to the "upper stratum of economic and social life," as shown by the following table:

People v.	*Crime Charged*	*Citation*	*Defendant's Occupation*
Gibbs	larceny	259 App. Div. 701	insurance
Hines	conspiracy	284 N. Y. 93	insurance
Moran	bribery	259 App. Div. 716	attorney
Kuhn	larceny	262 App. Div. 718	president, German-Am. Bund
Rabenold	forgery	287 N. Y. 832	bank president
Gallagher	larceny	288 N. Y. 674	attorney
Alexander	manslaughter	293 N. Y. 870	lumber dealer
Mullens (2 defendants)	bribery	265 App. Div. 1042	a retired businessman and an insurance broker
Scotti	larceny	268 App. Div. 761	lawyer
Schwartz (4 defendants)	usury and forgery	270 App. Div. 218	a banker and three of his associates
Renda	manslaughter (abortion)	269 App. Div. 736	doctor
Greenberg	income tax violation	268 App. Div. 1028	clothing manufacturer

Perhaps most illustrative are the cases of *People* v. *Alexander* and *People* v. *Schwartz*. In the *Alexander* case, the defendant was a wealthy owner of tenement houses who had neglected to comply with the safety provisions of the Tenement House Law. His conviction for manslaughter grew out of a fire in which seven of his Chinese tenants had lost their lives. The defendants in the *Schwartz*

petitioners have not only failed to produce evidence to support this grave accusation, but have affirmatively established that the special panel was selected by precisely the same men under exactly the same conditions as the concededly fair general list—before which the petitioners specifically asked to be tried (see 55-7, 64).

Both lists are prepared by the New York County Clerk's Division of Jurors under the general supervision of the witness McGurrin (81-3). Names for both lists are drawn from "All available sources—registration lists, tax lists, census lists, telephone directories" (83, 85-6, 125), the voting registry constituting "the most prolific source" (85); the qualifications of every candidate must be passed upon by one of the three "examiners" before he is placed on either list (87-8, 124, 126; *cf. Akins* v. *Texas*, 325 U. S. 398, 403). These very same examiners then decide what talesmen should be referred to Deputy County Clerks McGurrin or Kane (95), who have the final responsibility for making up the special jury lists (95-6, 104, 125).

Three of the five persons involved in this process were not even called to the witness stand. The petitioners specifically admitted that one of them (Kane) was "emi-

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case were the owners and operators of a widely known small-loan company which had violated the usury laws in its dealings with impecunious borrowers. Certainly, the district attorney would not have asked for a special jury in either of those cases if he had been in any fear that the list was comprised of jurors prejudiced "in favor of the interests of capital" and against "persons of humble station in life."

(In the foregoing tabulation, capital cases have not been taken into account because they invoke a provision of the special jury law not here involved (see p. 5, *supra*; *cf. People* v. *Hall*, 169 N. Y. 184, 196). Classification of *People* v. *Buchalter*, 262 App. Div. 738, and *People* v. *Comprodaily Pub. Co.*, 262 App. Div. 1008, is impossible. In the *Buchalter* case the two principal defendants were out-and-out gangsters with no known "occupations"; in the *Comprodaily* case, the defendants were, respectively, a corporation and a communist newspaper editor.)

nently qualified" for his position (97). Two (McGurrin and Kane) testified at length about their methods and motives.

The testimony of the witnesses McGurrin and Kane unequivocally establishes that the selection of talesmen for the special panel was in no way dependent upon their economic status, the nature of their occupations, the extent of their formal education, their place of residence, or upon any factor that might possibly result in discrimination along economic lines (106-7, 110, 120, 132); that the Division of Jurors did not even have any knowledge concerning the composition of the panel along such lines (107, 110); and that the Division's sole concern was to provide a list of special jurors who would meet the statutory qualifications and who would intelligently perform their vital function of giving every defendant a "fair" and "proper" trial (89, 92-3, 96, 127, 131-2).

In refutation of this unequivocal and uncontradicted testimony—all of which was introduced by the petitoners themselves—petitioners can point only to the occupational "survey" produced by the witness Mayell, which survey does not even purport to classify special jurors according to their position in "economic and social society" (*cf.* petition, p. 13), but only according to broad occupational groupings (*supra*, p. 13). However, even if we were to assume—despite the lack of supporting evidence—that the "survey" proved more than its author claimed for it, and that it somehow established that the number of persons on the special list engaged in "banking" and similar occupations was out of proportion to their representation in the community at large (Manhattan), and if we were further to assume that such persons necessarily belong to the "upper stratum" of society, the Mayell survey would still be a long way from suggesting—let alone establishing—that the list of special

jurors was deliberately weighted in favor of any class or group (see petition, pp. 4, 13).

Perhaps the best illustration of the weakness of the petitioners' position—even after all the foregoing assumptions have been made in its favor—is found in the contrast between the facts at bar and those presented in *Smith* v. *Texas*, 311 U. S. 128—the decision upon which the petitioners principally rely (petition, p. 10).

In the *Smith* case, deliberate discrimination against Negroes in the drawing of grand jurors was established by showing that: (a) an unmistakable pattern of discrimination had existed over a period of nine years; (b) the jury commissioners were aware of this situation and had even "discussed" the total absence of Negroes from the grand jury that had indicted the petitioner (311 U. S., at p. 131; *cf. Hill* v *Texas*, 316 U. S. 400, 404); and that (c) the jury commissioners had devised a system whereby thirteen out of the eighteen Negroes actually summoned for grand jury service during the nine years in question found themselves in last place on a list of sixteen talesmen, in circumstances "under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list" (311 U. S., at p. 131).

Here, on the other hand, the record discloses: (a) no pattern of any kind—the petitioners' so-called evidence relating exclusively to the condition of a constantly changing panel on one particular day; (b) the jury officials' absolute ignorance of any disproportion that may have existed in the panel's makeup; and (c) nothing even remotely suggesting a plan to keep any qualified juror from serving.

Most significant is the circumstance that the petitioners' so-called evidence relates exclusively to the condition of the panel on one particular day, and their consequent total

failure to establish any *pattern* of alleged discrimination. In no case has this Court upset a state court's finding of no discrimination unless the exclusion complained of was expressly required by a state statute (*Strauder* v. *West Virginia*, 100 U. S. 303; *Bush* v. *Kentucky*, 107 U. S. 110), or was established by a history of discrimination extending over a sufficient number of years to compel a finding that the exclusion had been deliberate [*cf. Akins* v. *Texas*, 325 U. S. 398, 402-404, with *Neal* v. *Delaware*, 103 U. S. 370, 397 ("no colored citizen had ever been summoned as a juror"); *Norris* v. *Alabama*, 294 U. S. 587, 596 ("a generation or longer"); *Hollins* v. *Oklahoma*, 295 U. S. 394, 395 ("for a long period"); *Hale* v. *Kentucky*, 303 U. S. 613, 614 ("from 1906 to 1936"); *Pierre* v. *Louisiana*, 306 U. S. 354, 359 ("from 1896 to 1936"); *Hill* v. *Texas*, 316 U. S. 400, 403 (at least "twenty-seven or twenty-eight years")].

The petitioners' position finds no support in *Glasser* v. *United States*, 315 U. S. 60, or *Thiel* v. *Southern Pacific*, 66 Sup. Ct. Rep. 984, 90 Law Ed. (Adv.) 922, the other two decisions of this Court upon which they rely (petition, pp. 12-15). In the first place, neither of those cases involved a constitutional question, both having been decided in the exercise of this Court's "power of supervision over the administration of justice in the federal courts" (see *Thiel* v. *Southern Pacific, supra*, 66 Sup. Ct. Rep., at p. 988; 90 Law Ed. (Adv.), at p. 926). Moreover, if the same rulings had been made on constitutional grounds, they would have strengthened—rather than weakened—the respondent's position in the instant case.

In *Thiel* v. *Southern Pacific*, the challenge to the jury was based upon the testimony of "the clerk of the court and the jury commissioner • • • that they deliberately and intentionally excluded from the jury lists all persons

who work for a daily wage" [66 Sup. Ct. Rep., at p. 986; 90 Law Ed. (Adv.), at p. 924]. In sustaining the challenge upon that unequivocal testimony, this Court went out of its way to make clear that litigants in federal courts are not entitled to a jury containing "representatives of all the economic, social, religious, racial, political and geographical groups of the community," but only to juries selected "without systematic and intentional exclusion of any of these groups" [66 Sup. Ct. Rep., at p. 985; 90 Law Ed. (Adv.), at p. 924]. As we have already shown, the instant record discloses neither "systematic" nor "intentional" discrimination against any class or group.

Glasser v. *United States* dealt with an allegation that "all the names of women placed in the box from which the panel was drawn were taken from a list furnished * * * by the Illinois League of Women Voters, and prepared exclusively from its membership, [and] that the women on that list had attended 'jury classes whose lecturers presented the views of the prosecution'" (315 U. S., at pp. 83-84). This Court merely ruled that, had the petitioners established the "deliberate selection of jurors from the membership of particular private organizations," the trial court's denial of their challenge to the panel would have been "a clear abuse of discretion" (315 U. S. 86-87). There is no need to comment further upon the disparity between the allegations made in that case and the facts proved in this one (see *supra*, p. 10).

We note, in passing, that even if total and systematic exclusion of women had been established, no constitutional question would be presented because "It does not even appear that any of the defendants belong to any of the excluded classes" (*Rawlins* v. *Georgia*, 201 U. S. 638, 640).

What we have already said disposes of the insinuation (petition, p. 8) that some sort of discrimination may have been accomplished by use of the question relating to the months within which prospective jurors might "prefer to serve" (*supra*, pp. 11-12).

Conclusion

Petitioners assert that their constitutional rights were violated by being forced to trial before a jury drawn from a panel selected in a deliberately discriminatory fashion. Their evidence not only fails to support this accusation, but affirmatively establishes its falsity.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1946.

Appendix A

Provisions of the New York Judiciary Law concerning qualifications and exemptions of jurors in the counties embraced within the City of New York

§ 596. Qualifications of jurors.

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, is a resident of that county, within the meaning of this section.

§ 597. Juror with scruples against death penalty.

No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has

conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of any crime punishable by death. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.

§ 598. Disqualifications.

(Omitted as irrelevant)

§ 599. Exemptions.

Each of the following persons only, any inconsistent provision of law to the contrary notwithstanding, although qualified, is entitled to exemption from service as a juror upon claiming exemption therefrom: 1. A clergyman or minister of religion officiating as such and not following any other calling.

2. A practicing physician, surgeon, or dentist having patients requiring his daily professional attention, a licensed pharmacist actually engaged in his profession as a means of livelihood, a duly licensed embalmer actually engaged in his profession as a means of livelihood, and an optometrist actually engaged in the practice of optometry.

3. An attorney or counsellor at law regularly engaged in the practice of law as a means of livelihood.

4. A person belonging to the army, navy or marine corps of the United States, and the active national guard and naval militia of the state.

5. A member of a fire company or department or police force or department duly organized according to the laws of the state or any political subdivision thereof and performing his duties therein; or an exempt volunteer fireman, as defined in section two hundred of the general municipal law.

6. A captain, engineer, or other officer, actually employed upon a vessel making regular trips; or a licensed pilot actually following that calling.

7. A woman.

8. Until July first, nineteen hundred forty-six, an editor, editorial writer, a sub-editor, reporter or copy reader, actively and regularly employed in the handling or gathering of news for a daily, semi-weekly or weekly newspaper.

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Supreme Court of the United States

October Term, 1946

Nos. 377, 452

JOSEPH S. FAY AND JAMES BOVE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF

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Supreme Court of the United States

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Nos. 377, 452

JOSEPH S. FAY AND JAMES BOVE,

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

Preliminary Statement

The petitioners were convicted on April 5, 1945, in the Supreme Court, New York County, of the crimes of conspiracy and extortion after a trial before a special jury drawn pursuant to the provisions of Section 749-aa of the New York Judiciary Law. They now challenge their convictions on the ground that the said statute is "unconstitutional and void * * * on its face" (R. 32; petitioners' brief,[1] pp. 4, 16, 41), and that the officials in charge of preparing the list of special jurors "systematically, intentionally, and deliberately" excluded women, laborers and "persons of humble station in life," with result that the petitioners were denied the equal protection of the laws and due process of law (R. 33; petitioners' brief, pp. 15-17).

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[1] The brief filed by the petitioner Bove merely adopts the arguments advanced by his co-petitioner. Accordingly, we refer to the one filed by Fay as the "petitioners' brief."

The proceedings below, the nature of the prosecution, the questions presented and respondent's position thereon, the pertinent statutory provisions and their application to the facts at bar, and a summary of the relevant evidence are all set forth at pages one to thirteen of the respondent's brief in opposition to petition for writ of certiorari—which will hereinafter be referred to as the respondent's "certiorari brief." References therein are to pages of the transcript of proceedings below, which have become folios of the Transcript of Record. Unless otherwise indicated, references herein are to pages of the Transcript of Record.

Outline of Argument

Our argument will be presented under three headings:

I. The New York special jury law is fair on its face and was appropriately invoked in the instant case.

II. The evidence conclusively establishes that the officials responsible for preparing the list of special jurors did not discriminate against any class or category of qualified persons.

III. Even if the petitioners had established that women, laborers and "persons of humble station in life" had been deliberately excluded from the special jury panel, no constitutional question would have been presented.

A. Since the jurors empanelled were fair and impartial, the requirements of due process were fully satisfied.

B. Since the petitioners do not belong to any excluded class and have failed to show how the alleged exclusion could have affected the verdict, they are in no position to raise a question of equal protection.

POINT I

The New York special jury law is fair on its face and was appropriately invoked in the instant case.

The New York special jury statute has been in effect without pertinent change since 1896.[2] It has been said to present "no due process question requiring review by this court" (*Buchalter* v. *New York*, 319 U. S. 427, 430).

Its essential purpose is to facilitate "the administration of justice in criminal cases" by providing a readily available list of "fair, competent and impartial" jurors, eliminating "those who should not sit, or who would be disqualified from acting • • • whether from the standpoint of the prosecution or of the defendant" [*People* v. *Dunn* (1899) 157 N. Y. 528, 532, 537]. To this end, it provides a list of special jurors to be selected "from the persons qualified to serve as trial jurors." So far as here relevant, the statute excludes from the special jury list anyone who:

(a) "doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression"; or

(b) has such "opinion as to circumstantial evidence • • • as would prevent his finding a verdict of guilty upon such evidence"; or

(c) "avows such a prejudice against any particular defense to a criminal charge as would prevent his giv-

[2] Compare Laws of 1896, ch. 378, §§ 8, 13 with Judiciary Law, § 749-aa; subds. 2, 4; see "Statutory Provisions Concerning General and Special Jurors; and Their Application to the Case at Bar"—respondent's certiorari brief, pp. 3-8. See appendix B page 31

ing a fair and impartial trial upon the merits of such defense"; or who

(d) "avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal [so] to testify * * * shall not create any presumption against him."

Applications for trial before juries drawn from this special list are addressed to the discretion of the trial court, may be made by either side, and may be based upon any fact establishing that the "due, efficient and impartial administration of justice" will thereby be advanced (Judiciary Law, § 749-aa, subd. 4; respondent's certiorari brief, p. 6).

The foregoing statutory scheme seeks to promote the "fair, competent and impartial" administration of justice in the criminal courts [3] by establishing a special list of talesmen having qualifications which are particularly essential to the fair consideration of highly publicized and hotly contested criminal actions (*cf.* R. 49-50, 56). The standards adopted by the legislature—now "embodied in the questionnaire which is given to each prospective juror" (R. 42, 508A)—are appropriately designed to achieve this purpose.

But beyond that, no constitutional question would have been presented even if the statute had failed to set up any standards, but had left the matter of jury selection en-

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[3] It is for such purposes that special juries of one sort or another have been employed from the inception of the common law [see *People* v. *Tweed* (Sup. Ct. N. Y. Co. 1876) 50 How. Prac. 262, 263; *Rex* v. *Edmonds* (1821) 4 Barn. and Ald. 471, 476-477; see, also, Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898) pp. 94, 96-97; Thompson and Merriam, *On Juries* (1882) p. 12; Goebel and Naughton, *Law Enforcement in Colonial New York* (1944) pp. 619-620].

tirely to the discretion of the deputy county clerks (*Murray* v. *Louisiana*, 163 U. S. 101, 108; *Williams* v. *Mississippi*, 170 U. S. 213, 225; *Franklin* v. *South Carolina*, 218 U. S. 161, 167-168; *Akins* v. *Texas*, 325 U. S. 398, 403; see also *Ex parte Virginia*, 100 U. S. 339, 348).

Nor is there any merit in the petitioners' assertion that the trial court's action in granting the application for a special jury was "without justification" (petitioners' brief, p. 26). On the contrary, each of the statutory qualifications set forth at pages 3-4, *supra*, is peculiarly applicable to the instant prosecution.

a. The petitioners themselves were the first to invoke the extraordinary publicity this prosecution had received as a reason for judicial action. On that ground, they initially applied for a transfer of the case from the Court of General Sessions to the Supreme Court [R. 26; 48 N. Y. Supp. (2d) 2, 4], and then moved for a change of venue to another county (R. 86-90, 510A). They must, therefore, admit the importance of eliminating from the panel any juror who doubted his ability "to render an impartial verdict upon the evidence" uninfluenced by impressions "formed from newspaper reading."

b. The basic charge against the petitioners was conspiracy (R. 4-7)—one which must ordinarily be proved by circumstantial evidence (see *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 612; *Glasser* v. *United States*, 315 U. S. 60, 80). Hence, no juror whose "opinion as to circumstantial evidence • • • would prevent his finding a verdict of guilty upon such evidence" would be competent to serve.

c. The petitioners interposed a peculiarly unpopular defense. Admitting that they had personally received over $300,000 from employers of laboring men whom they pur-

ported to represent, the petitioners contended that they were not guilty of extortion because they had received the money as bribes (R. 386, 393, 414, 468; respondent's certiorari brief, p. 2). It was, therefore, vital to eliminate any prospective juror who harbored "such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense."

d. Neither petitioner took the witness stand in his own defense, which made it essential that the jury be composed of persons able to give them "the full benefit of the statutory provision that such * * * neglect or refusal to testify * * * shall not create any presumption against" them.

In Summary: The statute is not only fair on its face, but the wisdom and appropriateness of its terms are aptly illustrated by the very circumstances now before the Court.

POINT II

The evidence conclusively establishes that the officials responsible for preparing the list of special jurors did not discriminate against any class or category of qualified persons.

The uncontradicted testimony of Deputy County Clerks McGurrin and Kane establishes that New York County's special jury list was prepared without trace of discrimination against any class or category of qualified persons (see "Evidence Concerning the Selection of General and Special Jurors" and "Argument"—respondent's certiorari brief, pp. 9-16). Thus, the choice of its talesmen was in no way influenced by the nature of their occupations, the extent of their formal education, their place of residence, or by any

factor that might result in discrimination along economic or social lines (R. 59-63, 71, 81); the officials in charge were not even aware of the panel's social or economic composition (R. 60-2); and their sole concern was to provide a list of special jurors who would meet the statutory qualifications and would intelligently perform their vital function of giving every defendant a "fair" and "proper" trial (R. 46, 51, 76, 80).

The petitioners now seek to dispose of this uncontradicted testimony of their own witnesses by simply asserting that "The officials of the Division of Jurors denied this [discrimination], as such officials uniformly do in these cases" (petitioners' brief, p. 19).

We shall demonstrate that the officials in charge of jury selection were without motive—either official or personal—to indulge in unlawful discrimination or to commit perjury in open court (A, *infra*, pp. 7-11); that every argument now advanced to suggest that they have done so is without basis (B, C and D, *infra*, pp. 11-15); and that the petitioners' statistical tables do not suggest intentional, or even accidental, discrimination against any class or category of qualified persons (E, *infra*, pp. 15-19).

A. *The officials in charge of jury selection were without motive to discriminate against any class or category of qualified persons, or to commit perjury on the witness stand.*

The petitioners' entire factual argument rests upon the unstated premise that the New York County special jury list was called into being to meet the exigencies of the present prosecution and, accordingly, that the officials in charge of its selection had some overriding motive to pack it with persons from the "upper stratum of economic and

social life" who were believed to be prejudiced against union leaders and those of "humble station in life" (R. 33). Failing such a premise, there would be no justification for the petitioners' apparent belief that every ambiguity in the record constitutes proof of official wrongdoing,[4] or for their offhand dismissal of the testimony of their own witnesses as an unrelieved picture of brazen perjury.

The fact is that the list of special jurors was compiled neither for particular use in the present case nor for the general purpose of prosecuting labor leaders and others similarly situated. On the contrary, it was the product of a gradual growth over the years (R. 64), during which time it was used in a wide variety of situations. In many of these only disaster to the state could result from the use of jurors prejudiced against the humble or in favor of the wealthy (see tabulation of reported cases tried before special juries since 1938, respondent's certiorari brief, p. 14, n.5).

For example, in *People v. Alexander* (1944) 293 N. Y. 870, a landlord was convicted of manslaughter as a result of his negligence in maintaining a Chinatown tenement which had been destroyed by fire. The defendant's principal contentions were that he had been without notice of the conditions alleged to have established his liability; that the evidence against him was concocted by the surviving

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[4] Despite the settled doctrine that one who challenges state action before this Court must affirmatively establish every circumstance necessary to his attack (*Akins* v. *Texas*, 325 U. S. 398, 400-401; also *Tarrance* v. *Florida*, 188 U. S. 519, 520; *Martin* v. *Texas*, 200 U. S. 316, 321; *Glasser* v. *United States*, 315 U. S. 60, 87), petitioners seem to assume that where "there is no evidence whatever" concerning a given fact, such fact must be deemed to have been conclusively established in their favor (see, *e. g.*, petitioners' brief, pp. 19, 27).

tenants in order to fasten civil liability upon their wealthy landlord; and that his conviction would bring "woe unto the citizenry of this city * * * that own real estate here or own mortgages here," and, indirectly, unto the tenants dependent upon such "citizenry" (see *People* v. *Alexander*, record on appeal, defendant's summation, pp. 2955, 2961-2, 2967, 3044). In *People* v. *Schwartz* (1st Dept. 1945) 270 App. Div. 218, aff'd 296 N. Y. 547, four bankers and insurance men were convicted of operating a small-loan company (Madison Personal Loan, Inc.) in such manner as to exact usurious interest from its improvident borrowers. There, again, the victims of the crime were exclusively people of "humble station in life," while the defendants were members of the banking fraternity who, indeed, were able to call as character witnesses the principal officers of some of the city's leading financial institutions (see defendant Schwartz' Appellate Division brief, p. 4). *People* v. *Greenberg* (1st Dept. 1945) 269 App. Div. 1028, cert. den. 325 U. S. 877, involved the conviction of a manufacturer for income tax evasion.

Such use of the special panel is at war with the hypothesis that those in charge of its selection had official motive to fashion it as an instrument for protecting the wealthy or harassing the poor and the humble.

Moreover, the state itself moved for a special jury in each of these cases, where no prosecutor would willingly have risked going before a jury which considered itself to be the "organ of" any supposedly superior "social and economic class" (*cf.* petitioners' brief, p. 22). It is therefore clear that the district attorney's office—which should have been in a position to make accurate judgment of the matter—knew that the special panel's personnel was subject to none of the criticisms now suggested by the petitioners.

Not only is the absence of official reason for prejudicial action clearly established, but the record wholly fails to suggest any personal motive for discrimination on the part of those charged with jury selection. In this respect, the instant situation presents a striking contrast to every case in which this Court has invalidated a state conviction on the ground of an improperly selected jury.[5] In each such instance, the challenged jury had been selected by members of the dominant class in the community, whereas the excluded persons were members of a clearly defined minority group, for whose protection against majority prejudice specific constitutional and statutory measures had been enacted (see *Strauder* v. *West Virginia*, 100 U. S. 303, 306; U. S. C. Title 8, § 44). Indeed, the officials in charge of jury selection either candidly admitted, or obviously entertained, the conviction that public policy required the minority group's participation in jury service to be kept within the narrowest limits permissible under the rules laid down by this Court (see, *e. g.*, *Neal* v. *Delaware*, 103 U. S. 370; *Smith* v. *Texas*, 311 U. S. 128; and *Hill* v. *Texas*, 316 U. S. 400).

Thus, in the *Neal* case, the State of Delaware frankly conceded that "none but white men" were selected as jurors, but sought to justify the practice by arguing that "the great body of black men residing in this State are utterly unqualified . . . to sit on juries" (103 U. S., at pp. 393-394). In the more recent *Smith* and *Hill* cases, the Court took special note that the jury commissioners had been aware that no Negroes were appearing on panels selected by them and had even "discussed" the matter (311 U. S., at p. 131; 316 U. S., at p. 404).

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[5] See *infra*, page 23, note 12.

In the instant case, on the other hand, there is no indication that those charged with selecting the special jury—two deputy county clerks and three "examiners" (R. 40, 44-6, 75)—themselves belonged to the "upper stratum of economic and social life," or that they were afflicted with social or economic bias of any kind.

In brief, nothing in the evidence casts reflection upon the personal or official integrity of those charged with selecting jury panels in New York County. There is no justification for the petitioners' cavalier assertion that these men first violated their constitutional oaths of office by unlawfully discriminating against certain classes of qualified persons, and then—"as such officials uniformly do"—proceeded to compound their offense by giving perjured testimony in open court. Certainly, the record contains no evidence to suggest that the contrary findings of three separate state tribunals (R. 85, 518-9, 533-4) were arbitrary, capricious or unreasonable (see *Akins* v. *Texas*, 325 U. S. 398, 401-402).

B. *There was no impropriety in questioning prospective jurors as to their preferences respecting time of service.*

One of the inquiries appearing on the questionnaire signed by all jurors is the following (R. 508A):

> "What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months) _____"

As explained at pages 11 to 12 of our certiorari brief, the purpose of this question—inserted in the questionnaire with approval of the Appellate Division (R. 71-2)—is to enable the county clerk to accommodate jurors by having them

called only during the months in which they can most conveniently serve. In regard to special jurors, however, it is impossible, as a practical matter, to predict during what season, or for how long, their services will be required (respondent's certiorari brief, p. 12, n.4). Accordingly, only persons "available for service any time" are placed on the special list (R. 49-50, 67-8). This practice is clearly a proper one [*cf. People* v. *Chrisoulas* (1937) 367 Ill. 85, 88-89], and can give rise to no constitutional question.

Moreover, there is no evidence that it was employed for any but its proper and intended purpose; that a talesman's expression of preference was affected by his economic or social status; or that a single person of "humble station in life" was thereby eliminated from the special panel.

C. *There was no exclusion of women.*

Under New York law, women are granted an absolute and unconditional exemption from jury service (Judiciary Law, § 599, subd. 7; respondent's certiorari brief, Appendix A, pp. 22-23). Finding that "such a large, large percentage" of women habitually claimed their exemption (R. 75), the officials in charge of the division of jurors quite sensibly concluded that it would merely give rise to useless irritation to compel unwilling women to present themselves for examination at the county clerk's office [*cf. Rawlins* v. *Georgia*, 201 U. S. 638, 640; *United States* v. *Brady* (D. C. D. Md. 1942) 47 Fed. Supp. 362, 365, aff'd 133 Fed. (2d) 476, 478, cert. den. 319 U. S. 746, 784], and that a greater number of women jurors could ultimately be obtained by encouraging them to volunteer for service [R. 43, 75; *cf. Walker* v. *United States* (C. C. A. 8th 1937) 93 Fed. (2d) 383, 390-391, cert. den. 303 U. S. 644].

Nothing in these circumstances even remotely suggests the deliberate exclusion of women from jury service in New York County. Nor can the jury officials be criticized for their belief that volunteers for duty would most likely be found among women known to be "civic conscious" (*cf.* petitioners' brief, p. 23).

There is no similarity between the instant situation and the one considered in *Glasser* v. *United States*, 315 U. S. 60. It was there alleged that "all the names of women placed in the box from which the panel was drawn were taken from a list furnished * * * by the Illinois League of Women Voters, and prepared exclusively from its membership, [and] that the women on that list had attended 'jury classes whose lecturers presented the views of the prosecution'" (315 U. S., at pp. 83-84). The Court held that, had the petitioners established the "deliberate selection of jurors from the membership of particular private organizations," an "abuse of discretion" would have been established (315 U. S., at pp. 86-87).

Here, there is no suggestion that the women appearing on the special panel had been selected "from the membership of particular private organizations" or that a single special juror had attended "jury classes" or belonged to the League of Women Voters or any other "private" organization. None of the three women examined on the *voir dire* was questioned as to her membership in such organizations (R. 224-7, 269-73, 340-1; see respondent's certiorari brief, p. 10, n.3). Indeed, the only pertinent testimony is that of Mr. McGurrin that no jurors were on the special list as result of recommendation by any "public or civic" group (R. 65-6).

D. *Nothing in the reports of the Judicial Council casts doubt upon the constitutionality of New York County's special jury system.*

At pages 27 to 32 of their brief, petitioners set forth numerous excerpts from various reports of the New York Judicial Council and conclude therefrom that the use of a special jury "as distinguished from a general jury" operates to deny a defendant "the equal protection of the laws in violation of the Fourteenth Amendment" (brief, p. 33).

While the quotations used by the petitioners establish that the Judicial Council is in favor—as a matter of legislative policy—of repealing Section 749-aa of the Judiciary Law, the Council has never expressed doubt of the constitutionality of the statute as applied in New York County. In fact, every member called upon to pass on the question has concurred in one or more decisions upholding New York County's special jury panel.[6] Two of the Council's members, Chief Judge LOUGHRAN and Presiding Justice MARTIN, did so in this very case (R. 521, 533).

In brief, the considerations urged by the Judicial Council were put forward in pursuance of its statutory duty to "recommend * * * to the legislature any changes in the

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[6] CRANE, CH. J., Chairman, 1935-1939
People v. *Lunse* (1938) 278 N. Y. 303, 314-315

LEHMAN, CH. J., Chairman, 1941-1945
People v. *Lunse*, *supra*
People v. *Cullen* (1943) 290 N. Y. 667 (see appellant Shonbrun's brief, p. 15)

LOUGHRAN, CH. J., Chairman, 1945 to present
People v. *Cullen*, *supra*

MARTIN, P. J., member during entire period
People v. *Comprodaily Publishing Co.* (1st Dept. 1941) 262 App. Div. 1008 (see appellants' brief, pp. 5 to 22)

• • • methods of conducting the business in the courts which can be put into effect only by legislative action" [Judiciary Law, § 45 (e)], and its arguments present no judicial question. As the Court recently ruled, in refusing to consider a policy attack upon certain federal legislation (*Packard Motor* v. *N. L. R. B.*, no. 658—October Term, 1946):

> "However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them."

E. *Nothing in the petitioners' "survey" suggests discrimination against any class or category of qualified jurors.*

The only affirmative evidence produced by the petitioners was a so-called "survey" made by one Warren H. Mayell, an attorney associated with counsel for the petitioner Fay, who examined the original questionnaires on file at the county clerk's office, "found various occupations listed thereon" and "tried to classify them to groups, making them not too numerous" (R. 81-2).

Realizing the inadequacy of this "survey," the petitioners now present two further tables. One, allegedly prepared by the Bureau of Labor Statistics of the United States Department of Labor, regroups the Mayell classifications "to correspond as well as possible" with those of the 1940 federal census (petitioners' brief, pp. 11 to 12). The second purports to correlate such regrouped classifications with census figures for New York County (*id.*, p. 13).

Since these tables are based upon an interested and non-expert witness' attempt "to classify them [the special jurors] to groups" (R. 82) and upon an anonymous statistician's effort to make the first classification "corre-

spond as well as possible" to census figures (petitioners' brief, p. 11), they clearly do not constitute the type of evidence required of one seeking to invalidate a state conviction on federal grounds (see *Buchalter* v. *New York;* 319 U. S. 427, 431; *Akins* v. *Texas;* 325 U. S. 398, 401).

However, accepting the final table at its face value, it suggests nothing to indicate that the list was deliberately, or even accidentally, weighted in favor of the wealthy or socially elect. On the contrary, it is clear that any disproportions which may have been present were the inevitable by-products of the ordinary processes of jury selection.

The alleged predominance of "Professional" and "Clerical" workers, claimed to represent 56.8 percent of the list, is attributable to the recognized tendency of those categories to produce "jurors * * * whose service, by reason of their intelligence and character, would be highly desirable" (*United States* v. *Wood*, 299 U. S. 123, 148, 150).[7] Any deficiency of "Laborers," "Service workers," or "Operatives and kindred workers" is attributable to equally apparent considerations. Those categories are comprised of the very persons upon whom jury service would be so burdensome[8] that a "judge would be justified in excusing"

[7] This quotation refers to government employees resident in the District of Columbia, who would clearly fall within the categories under discussion.

[8] In February 1945, the average daily earnings of production workers in manufacturing industries in New York City were approximately $9.55, while laborers engaged in construction work were then earning approximately $12.65 per day (see Statistical Summary 1945 published by the New York State Department of Labor, Tables 8, 11 and 13; and the March-April issue of the Industrial Bulletin and Employment Review, p. 129). Jury fees being $3.00 a day, a construction worker would have been out of pocket approximately $125.45 by serving on the instant jury, whereas in the *Schwartz* case discussed at p. 9, *supra*, the cost to such a juror, assuming the same wage scale, would have been $299.15.

them on the ground of "undue financial hardship" (*Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 224). It being permissible for a "judge" to excuse jurors on such grounds, no constitutional question could be presented because the state may have assigned the function to non-judicial officers (*supra*, pp. 4-5; *Murray* v. *Louisiana*, 163 U. S. 101, 108; see *Akins* v. *Texas*, 325 U. S. 398, 402).

Nor is there basis for the suggestion that "Professional" and "Clerical" workers would tend to be hostile to union men or labor leaders. On the contrary, current headlines indicate that such persons are now perhaps the most union-conscious element of our labor force.[9] The records of the Court of Appeals disclose that as far back as 1938, the Metropolitan Life Insurance Company was engaged in a futile battle to avoid bargaining with the "Industrial Insurance Agents Union, Local 30, affiliated with the United Office & Professional Workers of America, C.I.O." (*Metropolitan Life Insurance Co.* v. *Labor Relations Board*, 280 N. Y. 194, 203-204).[10]

In this connection, it is significant that of forty-three talesmen questioned in such manner as to bring out any

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[9] Appendix A, *infra*, sets forth representative 1946-1947 headlines from the New York Times.

[10] Official reports further disclose completed litigations and New York State Labor Relations Board proceedings involving the following categories of professional, managerial and clerical employees (partial listing): **Advertising Employees** (artists, display, promotion): *Reuben H. Donnelley Corp.*, 5 S. L. R. B. 811; *Caroline G. Davis, Inc.*, 6 S. L. R. B. 386; *United Whelan*, 9 S. L. R. B., No. 3552; *Strauss Stores Corp.*, 9 S. L. R. B., No. 3879; *Lord & Taylor*, 10 S. L. R. B., No. 4006. **Bank and Title Company Employees** (clerks and tellers): *Bank of Yorktown* v. *Boland* (1940) 284 N. Y. 749; *Public National Bank & Trust Company of New York*, 8 S. L. R. B. 558; *Greenpoint Savings Bank*, 10 S. L. R. B., No. 4011; *Bank of Manhattan*, 10 S. L. R. B., No. 4010; *Security Title & Guarantee Co.*, 5 S. L. R. B. 178; *Title Guarantee & Trust Co.*,

(Continued on page 18)

possible union affiliations, seven, each of whom was the type of worker under discussion, were present or former union

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(Continued from page 17)

5 S. L. R. B. 180, 6 S. L. R. B. 914; *Lawyers Title Corporation of New York*, 5 S. L. R. B. 286. **Credit Clerks and Collectors:** *Gas Consumers Assn.*, 1 S. L. R. B. 492; *Abraham & Straus, Inc.*, 4 S. L. R. B. 349; *Busch Jewelry Co.*, 4 S. L. R. B. 617. **Draftsmen:** *Marble Industry Employers' Assn.*, 4 S. L. R. B. 388. **Insurance Company Employees** (agents and clerks): *John Hancock Mutual Life Ins. Co.*, 3 S. L. R. B. 98, 654; *Prudential Ins. Co.*, 4 S. L. R. B. 788; *Butchers Mutual Casualty Co.*, 7 S. L. R. B. 12; *United Mutual Life Ins. Co.*, 8 S. L. R. B. 125; *Workingmen's Cooperative Assn.*, 1 S. L. R. B. 256. **Managers** (including theatre, store, office, district superintendents): *National Shoe Stores*, 3 S. L. R. B. 150; *Florsheim Shoe Store Co.*, 3 S. L. R. B. 296; *J. J. Theatres, Inc.*, 5 S. L. R. B. 1106; *Rand Tea & Coffee Stores, Inc.*, 7 S. L. R. B. 100; *RKO Service Corp.*, 7 S. L. R. B. 175; *Thomas Roulston, Inc.*, 7 S. L. R. B. 287; *Gulf Oil Corp.*, 8 S. L. R. B. 285; *Oppenheim Collins*, 9 S. L. R. B., No. 3468. **Pharmacists:** *Labor Relations Board* v. *Timen* (1st Dept. 1944) 264 App. Div. 120; *United Cigar-Whelan Stores Corp.*, 1 S. L. R. B. 108; *Barbizon Plaza Pharmacy*, 3 S. L. R. B. 662; *Breitenbach Pharmacy, Inc.*, 8 S. L. R. B. 597. **Musicians, Conductors, Opera Artists:** *American Guild of Musical Artists, Inc.* v. *Petrillo* (1941) 286 N. Y. 226; *Opera on Tour, Inc.* v. *Weber* (1941) 285 N. Y. 348. **Office Workers** (including junior executives): *Labor Relations Board* v. *Interborough News Co.* (Sup. Ct., N. Y. Co. 1939) 170 Misc. 347; *Gulf Oil Corp.*, 2 S. L. R. B. 568, 8 S. L. R. B. 41; *International Railway Co.*, 2 S. L. R. B. 250; *Singer Sewing Machine Co.*, 2 S. L. R. B. 255; *Saks & Co.*, 4 S. L. R. B. 879; *Revere Copper and Brass Inc.*, 8 S. L. R. B. 351, 358; *United Traction Co.*, 8 S. L. R. B. 493; *S. H. Kress and Co.*, 8 S. L. R. B. 612; *Oppenheim Collins*, 9 S. L. R. B., No. 3468. **Postal Clerks:** *Railway Mail Assn.* v. *Corsi* (1944) 293 N. Y. 315.

The respective volumes of the State Labor Relations Board Reports contain decisions and orders dated as follows: Volumes 1 (July 1, 1937-Dec. 31, 1938); 2 (1939); 3 (1940); 4 (1941); 5 (1942); 6 (1943); 7 (1944); 8 (1945). Volumes 9 (1946) and 10 (1947) are unpublished, and references are to case numbers.

members.[11] One of them was a member of the executive board of the Apartment House and Superintendent Managers Union Local 219 (A. F. of L.) (R. 150-1).

Finally, there is no evidence (*cf. supra*, p. 8, n.4) that the occupational composition of the special panel was in any way different from that of the concededly fair general list. On the contrary, the only pertinent testimony is that both lists were prepared by the same officials under identical conditions, and that occupational differences played no part in determining upon which panel a talesman might find himself (see respondent's certiorari brief, pp. 15-16).

In summary: The officials charged with selecting New York County's special panel, called to the stand by the petitioners, unequivocally testified that the panel was chosen without discrimination against any class or category of qualified persons. The petitioners' statistical tables, taken at their face value, do not suggest improper discrimination of any kind but disclose only the disproportions incident to the normal processes of jury selection.

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[11] Harvey W. Frank, engineer, former member of the New York Telephone Employees Union (R. 94, 98); William H. Conboy, bill investigator, present member of the Brotherhood of Consolidated Edison Employees (R. 113, 117); Walter R. Butler, apartment house superintendent, present member of the executive board of the Apartment House and Superintendent Managers Union Local 219 (A. F. of L.) (R. 150-1); Ruth F. Bien, former school teacher, former member of Local 5 of the Teachers Union (R. 226); Louis Spahn, apartment house superintendent, former member of the United Brotherhood of Carpenters and Joiners and of the International Association of Machinists (both A. F. of L.) (R. 263-4); Philip F. Brady, electrical foreman, former member of the Brotherhood of Electrical Workers Local 3 (A. F. of L.) and Brotherhood of Consolidated Edison Employees (R. 309-11); Junius H. Smith, bookkeeper [?], present member of an unidentified union which apparently had a closed shop agreement covering the employees of Brooks Brothers (R. 353-4).

POINT III

Even if the petitioners had established that women, laborers and "persons of humble station in life" had been deliberately excluded from the special jury panel, no constitutional question would have been presented.

Assuming that the petitioners had established all their factual claims, they would still have failed to present a question of due process or of equal protection.

The petitioners' failure to show that a single juror empanelled in this case had "actual bias" either against them or in favor of the prosecution is a complete answer to any claim based on due process (A. *infra*, pp. 20-23).

Although questions of equal protection have heretofore been found to exist only when persons had been excluded from a jury on grounds of race, religion or political affiliation (see cases cited petitioners' brief, p. 18), it is the petitioners' contention that the Court should now extend the doctrine to cover alleged exclusion based on considerations of sex, occupation or ecomonic status. However, since the petitioners belong to none of the classes now claimed to have been excluded and have failed to show how the alleged exclusion could have affected the verdict, they are in no position to raise a question of equal protection (B. *infra*, pp. 23-25).

A. *Since the jurors empanelled were fair and impartial, the requirements of due process were fully satisfied.*

The petitioners were tried before a jury selected after extensive voir dire examination, during which every one of their challenges for cause was sustained by the trial court (R. 186, 208, 238-9, 297), and at the conclusion of which

each of the twelve jurors and two alternates had been declared "satisfactory" (R. 112, 172, 189, 192, 202, 244, 269, 273, 277, 333, 348, 358) or "acceptable" (R. 283, 322) to the defense. The petitioners having thus failed to make a "convincing showing of actual bias on the part of the jury which tried" them, they can assert no claim under the due process clause (*Buchalter* v. *New York*, 319 U. S. 427, 430; see also *Spies* v. *Illinois*, 123 U. S. 131, 179-180).

Due process does not require a state to select its jurors from any particular portions of its population, but leaves it free to adopt any rules which, as an end result, provide "impartial" finders of fact (*Brown* v. *New Jersey*, 175 U. S. 172, 175-176; see also *United States* v. *Wood*, 299 U. S. 123, 145-146).

Thus, the state may confine its jury service to "males"; may require jurors to be "freeholders" or "poll tax" payers; and may prescribe appropriate educational requirements (*Strauder* v. *West Virginia*, 100 U. S. 303, 310; *Neal* v. *Delaware*, 103 U. S. 370, 386; *In re Wood*, 140 U. S. 278, 284; *Gibson* v. *Mississippi*, 162 U. S. 565, 580; *Williams* v. *Mississippi*, 170 U. S. 213, 221-222; *Akins* v. *Texas*, 325 U. S. 398, 402, n.3). Moreover, it makes no difference whether permissible exclusion is accomplished by express statutory mandate or by administrative action (*Rawlins* v. *Georgia*, 201 U. S. 638, 640).

In brief, a defendant tried before a jury in a state court can no more challenge his conviction on the ground that the jurors were drawn from a panel which did not represent an economic and social cross-section of the community, than one tried before a judge without a jury could gain his freedom by making similar criticism of the state's judiciary.

Apt illustration of the principle that due process does not require jury panels to be representative cross-sections of the community is found in *Ballard* v. *United States*, 67 Sup. Ct. 261, 263, 264, 91 Law. ed. (adv.) 195, 197, 198. There, the Court expressly found that the exclusion of women from a jury might render it "less representative of the community than would be true if any economic or racial group were excluded." However, it recognized that, even in the federal courts, female representation is required only "in such States" where women are "eligible for jury service under local law."

Nothing in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, casts doubt upon the foregoing principles of constitutional law. The Court there ruled that federal juries, in so far as possible under controlling state legislation, must be "drawn from a cross-section of the community" (at p. 220). However, the Court, citing *McNabb* v. *United States*, 318 U. S. 332, 340, pointed out that it was not deciding a due process question, but was acting in the exercise of its "power of supervision over the administration of justice in the federal courts" (328 U. S., at p. 225).

At the page of the *McNabb* opinion to which attention was thus directed, the Court had spelled out the distinction between the requirements of due process and the standards by which the administration of justice in the federal courts should be judged, saying:

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

The distinction thus formulated soon found illustration in *Lyons* v. *Oklahoma*, 322 U. S. 596. There, the Court was confronted with action quite similar to that condemned in the *McNabb* case, but nonetheless ruled that no due process question was presented.

Applying the doctrine of these cases to the facts at bar, it becomes apparent that, even if the petitioners had established that New York County's special jury system was not operated in accordance with the rules laid down in the *Thiel* case (but see *supra*, Point II, pp. 6-19), they would still have failed to raise a question under the due process clause.

B. *Since the petitioners do not belong to any excluded class and have failed to show how the alleged exclusion could have affected the verdict, they are in no position to raise a question of equal protection.*

Despite petitioners' unsupported statement to the contrary (brief, p. 23), alleged discrimination in selecting a jury can raise a question of equal protection only where the convicted defendant is a member of the class claimed to have been excluded and can show wherein he has been "prejudiced by the wrongful exclusion" (*Rawlins* v. *Georgia*, 201 U. S. 638; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 225).[12]

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[12] In every case where the Court has set aside a state judgment on the grounds of discrimination in jury selection, it has done so at the instance of a person belonging to the class excluded, and in most of them it has expressly made that circumstance a ground of decision (*Strauder* v. *West Virginia*, 100 U. S. 303, 310; *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110, 117; *Carter* v. *Texas*, 177 U. S. 442, 447; *Rogers* v. *Alabama*, 192 U. S. 226, 231; *Norris* v. *Alabama*, 294 U. S. 587, 589; *Hollins* v. *Oklahoma*, 295 U. S. 394; *Hale* v. *Kentucky*, 303 U. S. 613; *Pierre* v. *Louisiana*, 306 U. S. 354, 362; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400; see, also, *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 576).

In *Rawlins* v. *Georgia, supra,* the Court gave as a reason for rejecting a challenge under the equal protection clause that (201 U. S., at p. 640):

> "The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act."

The Court further observed (*ibid.*):

> "It does not even appear that any of the defendants belonged to any of the excluded classes."

The doctrine was most recently recognized in the *Thiel* case. There the Court, after observing that it was acting in pursuance of its "power of supervision over the administration of justice in the federal courts," ruled that "On that basis" it became unnecessary to determine "whether the petitioner was in any way prejudiced by the wrongful exclusion" or "whether he was one of the excluded class" (p. 225).

In the instant case, the petitioners make no pretense of belonging to any "excluded class." They are not women and do not belong to any of the occupational groups supposedly excluded.[13] The only record evidence bearing upon the humbleness of their "station in life" is the conceded fact that during the years 1938 to 1944 they personally received over $300,000 from only five of the many contractors with whom they were then negotiating on behalf of their respective unions.[14]

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[13] Their own brief (table one, p. 11) classifies "Labor, union representatives" with "Proprietors, manager and officials"—one of the very categories about whose alleged dominance on the panel the petitioners now complain.

[14] In addition, federal court records disclose that the petitioner Fay reported a net taxable income (not including the above sum) of $65,850.77 for the calendar years 1940 to 1942; while the petitioner Bove reported $39,003.29 for a similar period (see *United States* v. *Fay*, U. S. D. C., D. N. J., criminal no. 4260; *United States* v. *Bove*, U. S. D. C., S. D. N. Y., criminal nos. 122-269, 122-375).

It is equally clear that the alleged exclusions could not have affected the verdict rendered. The only issue presented to the jury was whether the $300,000 with which the petitioners concededly enriched themselves had been taken from the contractors under duress or had been received from them in the form of bribes (R. 386, 393, 414, 468; respondent's certiorari brief, p. 2). Upon either theory, the jury was bound to find that the petitioners diverted to their own pockets upwards of $300,000 that contractors were willing to include in their labor costs and, to that extent, had misappropriated funds which rightfully belonged to the laborers they purported to represent. Such a defense, certainly, would have received short shrift from a jury partially or predominantly made up of laboring men. As the district attorney told the jury (R. 455-6):

> "I say to you that if the twelve truest friends that labor ever had were sitting in judgment on the defendants in this case, the testimony would not permit them to do other than denounce by their verdict the actions of the defendants as charged in the indictment in this case." [15]

It follows that the petitioners are in no position to ask the Court to consider whether the regulatory policies promulgated in the *Thiel* and *Ballard* cases (*supra*, p. 22) should be written into the constitutional concept of the equal protection of the laws.

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[15] Illustrative is the circumstance that the petitioner Bove was successfully sued by members of an affiliate of his own international union for making it "easy prey for plunder" [*Canfield* v. *Moreschi* (3rd Dept. 1944) 268 App. Div. 64, 73, aff'd 294 N. Y. 632; also, *Dusing* v. *Nuzzo* (3rd Dept. 1941) 263 App. Div. 59, 62-63]. As to Fay, see R. 527; "Dubinsky to Press Racketeering Test," New York Times, p. 1, col. 3, November 22, 1940.

Conclusion

Section 749-aa of the Judiciary Law—which has been in effect without pertinent change for over half a century—provides appropriate standards for empanelling "fair, competent and impartial" juries in criminal cases. The evidence demonstrates that the officials charged with selecting New York County's list of special jurors acted in obedience to their constitutional oaths of office and without discrimination against any class or category of qualified persons. There is, therefore, no merit in any of the factual claims now advanced by the petitioners.

Moreover, no constitutional question could be presented by showing that the State of New York had left the selection of jurors to the absolute and unguided discretion of administrative officials. Nor does the instant record present the question whether exclusion of women, laborers and "persons of humble station in life" would give rise to a problem under the Fourteenth Amendment. It follows that even if the petitioners had been able to sustain their factual claims, they would still have failed to present a federal question.

The judgments under review should be affirmed.

Respectfully submitted,

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March 1947.

APPENDIX A

A selection of representative headlines concerning strikes, threatened strikes and labor activity in New York City by professional and semi-professional groups and by clerical, sales and kindred workers.

[New York Times, 1946-1947]

Headline	Date	Page and Column
Apartment House Superintendents		
600 Apartment Buildings in City Face Threat of a Strike Thursday [Building Service Employes International Union, AFL]	Dec. 30, 1946	1:2-3
State Acts to Bar Apartment Strike —Men Walk Out in 2 Buildings as Parley Is Set for Today on City-Wide Stoppage • • • [Building Service Employes International Union, AFL]	Dec. 31, 1946	19:4
Bank and Brokerage Employes		
700 Out Two Hours at Stock Exchange—Employes Leave Posts to Vote for Strike but Trading Is Not Interrupted—Supervisors Handle Jobs—Union Meeting, Called to Show Strength, Follows Dispute With Brokerage House [United Financial Employes]	Aug. 15, 1946	27:5

Headline	Date	Page and Column
2 Exchanges Face Threat by Union —AFL Group Weighs Ending of No-Strike Contracts as Offshoot of Kidder Row [United Financial Employes, AFL; Financial Employes Guild, CIO]	Mar. 6, 1947	8:3
Civil Service Employes		
City Workers Seek Increase in Wages—4,000 Ask $350 Rise and Continued Bonus, With Better Working Conditions [sponsored by Central Trades and Labor Council, AFL]	Mar. 27, 1946	20:6
City Welfare Aides Threaten to Quit Unless Pay Rises—Labor Puts Full Strength Into Its Attack on the Mayor's Budget as Inadequate * * * [CIO and AFL units of city workers]	Apr. 14, 1946	1:1
Entertainers		
'No Opera' Threat by Metropolitan —Association Tells Subscribers Coming Season Depends on Guild Dropping Claims—Season Tickets Held Up—Guild to Meet Next Week on Association's Insistence on Right to Pick Staff [American Guild of Musical Artists]	Aug. 17, 1946	15:8
Muzak Silenced in Hotel Strike— Musicians Invoke for First Time the Clause Stopping Service to Hostelries Involved—Juke Boxes Also Barred—Recording Companies to Be Put on the Unfair List if Their Disks Are Used [American Federation of Musicians, AFL]	Sept. 4, 1946	25:8

Headline	Date	Page and Column
AFRA Weighs Strike on 4 Big Networks; Walkout Would Halt All Major Programs [American Federation of Radio Artists, AFL]	Nov. 1, 1946	8:3-4
Newspapermen		
Newspaper Guild Votes for 5 Pacts —Membership of Union in City Accepts Labor Contracts That Bring Pay Increases [Newspaper Guild of New York]	Feb. 5, 1946	15:3
Times Pay Rise Offer Is Rejected by Guild [New York Newspaper Guild, CIO]	Nov. 1, 1946	25:3
Teachers		
Strikes Approved By Teachers Guild—Union Here Urges a Reversal of AFL Policy—CIO Group to Plan Action Tonight [Teachers Guild, AFL; Teachers Union, CIO]	Dec. 20, 1946	6:5
Teachers to Stage Mass Pay Appeals—10,000 Expected at Meeting of the Board of Education—'March on Albany' Slated [Teachers Union, CIO; Teachers Guild, AFL; Teachers Salary Conference]	Jan. 16, 1947	9:1
Telephone Company Employes		
Phone Unions Here File Strike Notice—Three Groups Say They Expect to Join National Walkout Set for April 7 [technical and clerical workers including accounting employes]	Mar. 6, 1947	9:1

APPENDIX B

Addendum to footnote 2 on page 3

Six years after the enactment of this parent special jury statute (Laws of 1896, Ch. 378), the Court upheld its constitutionality (*Hall* v. *Johnson*, 186 U. S. 480).

In that case, the petitioner had been convicted of murder in the first degree and sentenced to death upon a verdict rendered by a special jury. After unsuccessfully challenging the constitutionality of the statute before the New York Court of Appeals (see *People* v. *Hall*, 169 N. Y. 184, 193-194), he sued out a writ of habeas corpus in the United States Circuit Court, alleging that he was "without means to prosecute a writ of error" (*Hall* v. *Johnson*, transcript of record, p. 10). He contended that the trial court had been without "jurisdiction to try the indictment" and that its proceedings had been "null and void" (*id.*, p. 10) because the statute pursuant to which the jury had been drawn "was repugnant to section 1 of the fourteenth amendment" (*id.*, pp. 6, 13) and because, even assuming the constitutionality of the statute, gross irregularities (not here relevant) had occurred in its application (*id.*, pp. 6-10, 13-14). The statute was challenged on the ground that it provided for a jury "taken from a particular body of citizens and not from the general body of the county as was provided in all cases wherein such special jury was not drawn," and, accordingly, that a defendant tried before such special jury "was denied the equal protection of the laws" (*id.*, p. 6).

The Circuit Court (LACOMBE, C.J.) denied the writ, but allowed an appeal to this Court (*id.*, pp. 12-13). This Court affirmed the order of the Circuit Court "on the authority of *Storti* v. *Massachusetts*, 183 U. S. 138, 141; *Brown* v. *New Jersey*, 175 U. S. 172; *Andrews* v. *Swartz*, 156 U. S. 272."

Since that decision, the special jury has been in almost continuous use in New York County. See, for example, cases in which judgments of death rendered upon verdicts of special juries have been affirmed by the Court of Appeals, *People* against: *Flanigan* (1903) 174 N. Y. 356; *Conklin* (1903) 175 N. Y. 333; *Hampartjoomian* (1909) 196 N. Y. 77; *Bowser* (1909) 196 N. Y. 296; *Loose* (1910) 199 N. Y. 505; *Gambaro* (1910) 199 N. Y. 511; *Wood* (1911) 201 N. Y. 158; *Wolter* (1911) 203 N. Y. 484; *Cain* (1912) 206 N. Y. 202; *Collins* (1912) 206 N. Y. 668; *Lingley* (1913) 207 N. Y. 396; *Roberts* (1912) 207 N. Y. 669; *Mulraney* (1913) 207 N. Y. 698; *Muehlfeldt* (1913) 209 N. Y. 550; *Seidenshner* (1914) 210 N. Y. 341; *Eng Hing* (1914) 212 N. Y. 373; *McKenna* (1914) 212 N. Y. 574; *Campanelli* (1915) 213 N. Y. 687; *Vogt* (1915) 213 N. Y. 688; *Draniewicz* (1915) 213 N. Y. 695; *Becker* (1915) 215 N. Y. 126; *Perry* (1915) 215 N. Y. 737; *Flack* (1915) 216 N. Y. 123; *Leggio* (1916) 216 N. Y. 764; *Shilitano* (1916) 218 N. Y. 161; *Bradford* (1916) 218 N. Y. 729; *Tolas* (1916) 218 N. Y. 747; *Bambrick* (1916) 218 N. Y. 751;

Impoluzzo (1917) 220 N. Y. 627; *Waite* (1917) 220 N. Y. 714; *Jazra* (1917) 221 N. Y. 485; *Waldenen* (1917) 221 N. Y. 521; *Mulholland* (1917) 221 N. Y. 623; *Schuster* (1917) 221 N. Y. 624; *Linton* (1918) 224 N. Y. 609; *Abbruzzo* (1919) 227 N. Y. 554; *Mihiterian* (1919) 227 N. Y. 617; *Harrison* (1919) 227 N. Y. 647; *Walters* (1920) 228 N. Y. 574; *Blaza* (1920) 229 N. Y. 540; *Sansone* (1920) 229 N. Y. 600; *Giordano* (1921) 231 N. Y. 633; *McCormick* (1922) 232 N. Y. 569; *Rosenwasser* (1922) 233 N. Y. 505; *Raffaele* (1922) 233 N. Y. 590; *Taizo* (1922) 233 N. Y. 662; *Boddy* (1922) 234 N. Y. 530; *Marino* (1923) 235 N. Y. 560; *Cusamano* (1923) 235 N. Y. 560; *Lozado* (1924) 238 N. Y. 597; *Marion* (1924) 238 N. Y. 635; *Miller* (1925) 240 N. Y. 698; *Hoyer* (1926) 243 N. Y. 572; *Garguila* (1926) 243 N. Y. 573; *Williams* (1926) 243 N. Y. 640; *Humes* (1926) 243 N. Y. 641; *Goldson* (1926) 243 N. Y. 641; *Bradley* (1926) 244 N. Y. 503; *Heslin* (1927) 245 N. Y. 591; *Albrecht* (1927) 245 N. Y. 617; *Seiler* (1927) 246 N. Y. 262; *Ecker* (1928) 247 N. Y. 538; *Hyland* (1928) 247 N. Y. 604; *Graham* (1928) 248 N. Y. 588; *Edel* (1929) 252 N. Y. 539; *Hirsch* (1930) 254 N. Y. 570; *Arata* (1931) 255 N. Y. 374; *Lytton* (1931) 257 N. Y. 310; *De Vore* (1932) 258 N. Y. 568; *Baumann* (1932) 259 N. Y. 600; *Corbellini* (1932) 259 N. Y. 591; *Harris* (1932) 260 N. Y. 511; *O'Neill* (1932) 260 N. Y. 523; *Brown* (1932) 260 N. Y. 594; *Jameison* (1932) 260 N. Y. 134; *Turner* (1932) 260 N. Y. 626; *Lopez* (1933) 261 N. Y. 667; *Rugama* (1933) 261 N. Y. 685; *Willis* (1933) 263 N. Y. 516; *Vogel* (1934) 264 N. Y. 604; *Leonti* (1934) 266 N. Y. 409; *Walsh* (1934) 265 N. Y. 611; *Mitchell* (1934) 266 N. Y. 15; *Leylegian* (1935) 266 N. Y. 606; *Jerossi* (1935) 267 N. Y. 505; *Brown* (1935) 268 N. Y. 698; *Orley* (1935) 269 N. Y. 509; *Flores* (1936) 271 N. Y. 648; *Springer* (1936) 272 N. Y. 624; *Russell* (1936) 272 N. Y. 647; *Fiorenza* (1936) 272 N. Y. 642; *Chew Wing* (1937) 274 N. Y. 477; *Wilson* (1937) 276 N. Y. 539; *Roberts* (1938) 277 N. Y. 688; *Lunse* (1938) 278 N. Y. 303; *Guariglia* (1938) 279 N. Y. 707; *Bohan* (1939) 279 N. Y. 723; *Gati* (1938) 279 N. Y. 631; *Alex* (1939) 279 N. Y. 760; *Sacoda* (1939) 281 N. Y. 827; *McDonald* (1939) 281 N. Y. 794; *Thingstead* (1939) 282 N. Y. 577; *Horn* (1940) 282 N. Y. 756; *Pryor* (1940) 283 N. Y. 623; *Ertel* (1940) 283 N. Y. 519; *Brown* (1940) 284 N. Y. 753; *Balatnicow* (1940) 284 N. Y. 787; *Celline* (1941) 285 N. Y. 736; *Garrett* (1941) 285 N. Y. 810; *Crumble* (1941) 286 N. Y. 24; *Ancrum* (1941) 287 N. Y. 633; *Esposito* (1942) 287 N. Y. 389; *Richardson* (1941) 287 N. Y. 629; *Mardavich* (1942) 287 N. Y. 344; *Clark* (1942) 289 N. Y. 618; *Sonsky* (1942) 289 N. Y. 722; *Mendez* (1942) 289 N. Y. 751; *Cullen* (1943) 290 N. Y. 667; *Castellano* (1942) 289 N. Y. 753; *Peller* (1943) 290 N. Y. 905; *De Jesus* (1943) 290 N. Y. 789; *Maduro* (1943) 291 N. Y. 529; *Regan* (1944) 292 N. Y. 109; *Almodovar* (1943) 291 N. Y. 628; *Pariti* (1944) 292 N. Y. 568; *De Lutro* (1944) 292 N. Y. 683; *Yun Tich Li* (1944) 293 N. Y. 742; *Little* (1945) 295 N. Y. 656. Appeals from three such judgments are now pending.

COPY

Supreme Court of the United States

October Term, 1946

Nos. 377, 452

JOSEPH S. FAY AND JAMES BOVE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

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17 Am. & Eng. Ency. of Law (2d ed. 1900) p. 1196	2
3 Blackstone's Commentaries 357	4
2 Burrill's Law Dictionary (1867) p. 477	4
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1 Holdsworth, History of English Law (3d ed. 1922) p. 333	2
2 Lilly's Practical Register (2d ed. 1745) pp. 155, B; 162, F, G, H	2
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THE PEOPLE OF THE STATE OF NEW YORK,
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RESPONDENT'S SUPPLEMENTAL MEMORANDUM

Introductory Statement

Upon oral argument, the Court requested information as to the history of special juries at common law and in the State of New York prior to the enactment of chapter 378 of the Laws of 1896, and as to the judicial treatment that statute and its successors have received from the New York courts. The historical material thus requested will be presented under the following headings:

A. Special juries at common law and in the State of New York prior to 1896;

B. Opinions of the courts of New York dealing with Chapter 378 of the Laws of 1896 and its successors.

In addition, appendices C, D and E (so designated to avoid confusion with appendices A and B of the respondent's brief) either set forth or summarize relevant New York statutes, beginning with colonial days, dealing with special juries and with the qualifications and exemptions of jurors. In Part Two of this memorandum, we set forth —without comment—certain factual material which appears relevant to questions arising upon the oral argument.

PART ONE — HISTORICAL MATERIAL

A

Special Juries at Common Law and in the State of New York prior to 1896.

"Special or struck juries were well known to the common law, their origin being so ancient that its date cannot be ascertained." [*Lommen* v. *Minneapolis Gaslight Co.* (1896) 65 Minn. 196, 211; see, also, *Anonymous* (1696) 1 Salk. 405; *King* v. *Burridge* (1724) 8 Mod. 245; *King* v. *Franklyn* (1731) 2 Barn. K. B. 95, 106; *Rex* v. *Waring MS* (1738) reported in *King* v. *Perry* (1793) 5 Durnf. & E. 453, 454; *Rex* v. *Hart* (1776) Cowp. 412; *Rex* v. *Wooler* (1817) 1 Barn. & Ald. 193, 202; *Rex* v. *Edmonds* (1821) 4 Barn. & Ald. 471, 476-477; 2 Lilly's *Practical Register* (2d ed. 1745) pp. 155, B, and 162, F. G. H; Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898) pp. 94-97; Forsyth, *Trial by Jury* (1875) pp. 143-145; 1 Holdsworth, *History of English Law* (3d ed. 1922) p. 333; 17 Am. & Eng. Ency. of Law (2d ed. 1900) pp. 1196-1199.]

Thus, in *People* v. *Dunn*, 157 N. Y. 528, *infra*, pp. 5 to 6, the New York Court of Appeals referred to an instance "in 1450, (29 Hen. VI), of 'a petition for a special jury, that is jurors "who dwell within the shire, and

have lands and tenements to the yearly value of XX£" to try a plea which it was supposed might be pleaded in abatement on a bill of appeal of murder' " (at p. 534).

Such juries were, from the earliest times, recognized "in nearly all of the States of the Union" [*Eckrich* v. *St. Louis Transit Co.* (1903) 176 Mo. 621, 639], and have been used in New York at least since 1728. [Appendix C, *infra*, pp. 14-21; *Zenger's Case* (1735) 17 How. St. Tr. 676, 688-689; *Franklin* v. *Nore* (1797) Cole. & Cai. Cas. 52; *Spencer* v. *Sampson* (1804) 1 Caine 498; *Foot* v. *Croswell, id.*, 498; *Manhattan Company* v. *Lydig* (1805) Cole. & Cai. Cas. 423; *New-Windsor Turnpike Company* v. *Ellison* (1806) 1 Johns. 141; *People* v. *Tweed* (Sup. Ct. N. Y. Co. 1876) 50 How. Pr. 262, 263; Goebel and Naughton, *Law Enforcement in Colonial New York* (1944) pp. 168, 250, 534, 619-620, and manuscript cases cited therein showing use of a special jury in 1728; *Gulf &c. Railway Co.* v. *Shane*, 157 U. S. 348; *Anonymous* (C. C. D. Pa. 1797) Fed. Cas. No. 443; *Hall* v. *Perott* (C. C. E. D. Pa. 1830) Fed. Cas. No. 5942; *Parsons* v. *Philadelphia, W. & B. R. Co.* (1894) 16 Del. (2 Marv.) 379; *Inskeep* v. *Lecony* (1790) 1 N. J. L. 39; *State* v. *Murat* (1827) 9 N. J. L. 3; *Sutton* v. *State* (1839) 9 Ohio 133; *Ross* v. *Eason* (Pa. 1796) 2 Yeates 126; see, also, historical review of state legislation in *Lommen* v. *Minneapolis Gaslight Co., supra*, 65 Minn. 196, 212-214, 216; and U. S. C. A. Title 28, §418.]

The constitutionality of such juries has been upheld wherever assailed (*Brown* v. *New Jersey*, 175 U. S. 172; *People* v. *Dunn*, 157 N. Y. 528, *infra*, pp. 5 to 6; *Lommen* v. *Minneapolis Gaslight Co., supra*, 65 Minn. 196; *Eckrich* v. *St. Louis Transit Co., supra*, 176 Mo. 621).

Although the machinery for obtaining a common law special or struck jury was different from the one provided by the present New York statute, the basic purpose and characteristics of the two types of special juries are identical. With both, a jury commissioner or other public

official is empowered to select from the reservoir of general jurors a list of persons deemed by him especially qualified for use in cases of unusual importance or intricacy [compare N. Y. Laws of 1896, Ch. 378 with Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898) p. 96; 3 Bl. Com. 357; 2 Burrill's *Law Dictionary* (1867) pp. 477-478; Duncombe, *Trials per Pais* (7th ed. 1739), p. 90; see, also, *Rex* v. *Edmonds, supra,* 4 Barn. & Ald. 471, 484-485].

While the present New York statute sets forth standards to guide the county clerk in selecting special jurors (see respondent's certiorari brief, p. 5), the struck jury system left their selection entirely to the unguided discretion of the official in charge. The struck jury statute upheld in *Brown* v. *New Jersey, supra,* 175 U. S. 172, authorized "the court" to "select from the persons qualified to serve as jurors * * * ninety-six names" from which the defendant and the prosecutor should each strike twenty-four (at pp. 174-175). Similarly, the statute considered in *Lommen* v. *Minneapolis Gaslight Co., supra,* 65 Minn. 196, empowered the sheriff to "select" from those "qualified to act as jurors in the county, 40 such persons as he shall think most indifferent between the parties, and best qualified" to try the issue (at. p. 206). Neither of these statutes provided any guiding standards. Nor were such standards set forth in any of the New York colonial or pre-1896 statutes (see Appendix C, *infra,* pp. 14-21; *cf. Rex* v. *Wooler, supra,* 1 Barn. & Ald. 193, 202).

The only other significant distinction is that the present New York statute seeks to provide a panel available to all litigants, whereas the struck jury system contemplated the creation of a special list to meet the needs of each particular case [compare *Industrial & General Trust, Ltd.* v. *Tod* (1st Dept. 1905) 104 App. Div. 517, 520, with *Jerome* v. *New York Evening Journal Publishing Co.* (1st Dept. 1908) 124 App. Div. 372, 375-376].

B

Opinions of the courts of New York dealing with Chapter 378 of the Laws of 1896 and its successors.

1. *The constitutionality of the statute*

Three years after its enactment, the validity of Chapter 378 of the Laws of 1896 was upheld by the New York Court of Appeals in *People* v. *Dunn* (1899) 157 N. Y. 528, 43 L. R. A. 247 (see respondent's certiorari brief, pp. 6-7; respondent's brief, p. 3). The case arose upon a question certified by the Appellate Division of the Supreme Court (157 N. Y., at p. 529):

> "'Is the act of the legislature embodied in chapter 378 of the Laws of 1896, providing for a special jury in criminal actions in certain cases, a valid and constitutional exercise of legislative power?'"

So far as here relevant, the appellant there attacked the legislation on three grounds, claiming (*id.*, at p. 532):

> "[A] that it is violative of the right of trial by jury;
>
> "[B] that it creates two classes of jurors and discriminates unequally; [and]
>
> "[C] that it delegates judicial powers to the special jury commissioner . . ."

After a thorough review of the historical development of special juries at common law (*id.*, pp. 533-536, see, also, 43 L. R. A., at p. 249), the court disposed of the foregoing contentions as follows:

As to due process (157 N. Y., at p. 538):

> "I think that we may dismiss the objections that the defendant is deprived by this act of due process of

law, or that it subjects him to any unequal discrimination, with the remark that, if he is secured a trial before an impartial jury taken from the county and conducted according to the law of the land, he has had all the benefit of the constitutional guaranty. No substantial right is infringed upon; for, as it is suggested in the opinion below, neither the letter nor the spirit of the Constitution guarantees to him a chance to select an ignorant or partial jury."

As to equal protection (*id.*, at p. 539):

"while it is, in a sense, true that the persons upon the two lists are differently qualified with respect to service in the criminal branch, it would be incorrect to regard that difference as other than one based upon their fitness for the jury service demanded. The argument that the defendant has more chances for success, or more rights, before a jury drawn from the general list is incomprehensible; unless upon the theory that he has some inherent, or substantial, right to the chance of making his defense before a jury composed of men whose ignorance, or partiality, or mental constitution might result in a disagreement, if not in an acquittal. That would be reducing the constitutional guaranty to an absurdity."

As to the claim that judicial powers had been delegated to the jury commissioners (*id.*, at pp. 538-539):

"Nor are any judicial powers delegated to the special jury commissioner. He exercises the same ministerial power that the ordinary commissioner of jurors does, in examining the qualifications of those liable to serve as jurors. He is the official created by the law, upon whom is devolved the duty of eliminating from the jury list persons declared by law to be unfit, or disqualified, to sit in criminal cases, and of having in readiness, for the time when a special jury is ordered by the court, for the better administration of justice, a list from which a panel of fit and impartial jurors may be chosen."

All subsequent attacks upon the constitutionality of the statute have, where opinions were delivered, been disposed of by reference to the foregoing decision [*People* v. *Meyer* (1900) 162 N. Y. 357, 361-362; *People* v. *Hall* (1901) 169 N. Y. 184, 194 (*cf. Hall* v. *Johnson*, 186 U. S. 480); *People* v. *Conklin* (1903) 175 N. Y. 333, 339; *People* v. *Wolter* (1911) 203 N. Y. 484, 491; see *People* v. *Buchalter* (1942) 289 N. Y. 181, 221, aff'd 319 U. S. 427, 430].

In the *Buchalter* case, the Court of Appeals succinctly observed (289 N. Y., at p. 221):

> "The statute is constitutional (*People* v. *Dunn*, 157 N. Y. 528) * * *."

In *People* v. *Lunse* (1938) 278 N. Y. 303, 314, the Court of Appeals held that the then existing exclusion of women from the special panel was no ground for challenging a jury selected therefrom.

2. *Denial of motions for change of venue on the ground that the issues were triable before a special jury*

Appellate courts, in upholding denials of motions for change of venue, have based their decisions upon the ground, among others, that the defendants had the opportunity to be tried before special juries and were thus assured of a fair and impartial trial in the county where the offense had been committed [see *People* v. *Buchalter*, *supra*, 289 N. Y. 181, 220-221, aff'd 319 U. S. 427; *People* v. *Hyde* (1st Dept. 1912) 149 App. Div. 131, aff'g 75 Misc. 407; *People* v. *Brindell* (1st Dept. 1921) 194 App. Div. 776].

In *People* v. *Hyde*, *supra*, the Appellate Division, in rejecting a claim that inordinate newspaper publicity required the removal of a trial from New York County, ruled (149 App. Div., at p. 136):

> "Considering the population of New York county, its large general jury list and its carefully selected special jury, we feel perfectly confident that it is not necessary to send this indictment for trial to any other county to enable the defendant to enjoy his undoubted right to a fair and impartial jury."

In the same case, Mr. Justice LEHMAN (later Chief Judge of the Court of Appeals), sitting at special term, had observed (75 Misc., at p. 417):

> "So far as the charge that the accused resigned while under indictment is concerned, I do not believe that any person fit to be a special juror regards this resignation as any admission of guilt * * *."

3. *Motions for trials before special juries in New York County*

So far as we have been able to determine, there are only three officially reported opinions dealing with motions made in New York County for trials before special juries [*People* v. *Edmondson* (Gen. Sess. 1937) 168 Misc. 141; *People* v. *Manganaro* (Gen. Sess. 1940) 174 Misc. 398; *People* v. *Elia* (Gen. Sess. 1940) 173 Misc. 1076, aff'd 262 App. Div. 836].

In the *Elia* case, Judge DONNELLAN, after rejecting the claim that special juries were "convicting juries," observed (173 Misc., at p. 1078):

> "The real objection to a special panel seems to be that they are selected after a more careful examination by the commissioner of jurors, and are supposed to be individuals of superior intelligence. Why this condition should work to the detriment of the defendants is something hard to understand."

In the *Manganaro* case, the same judge denied the district attorney's application for a special jury.

In an unreported opinion appearing in the New York Law Journal for January 23, 1940 (Vol. 103, No. 19, p. 354,

cols. 5 and 6), the Court of General Sessions granted a special jury for the trial of Elwood M. Rabenold, the president of the Clinton Trust Company (see respondent's certiorari brief, footnote 5, pp. 14-15). In the course of its opinion the court said:

> "the court will observe in passing that its experience has been that special juries render intelligent and impartial jury service and that in proper cases their employment tends to advance the proper administration of the criminal law."

4. *Use of special juries in civil cases*

By Chapter 602 (Section 5) of the Laws of 1901, the privilege of applying for special juries under the statute of 1896 was extended to litigants in civil cases. As far as we can determine, only four appellate decisions have dealt with that aspect of the statute [*Jerome* v. *New York Evening Journal Publishing Co.* (1st Dept. 1908) 124 App. Div. 372; *People* v. *McClellan* (1st Dept. 1908) 124 App. Div. 664; *Coler* v. *Brooklyn Daily Eagle* (2nd Dept. 1909) 133 App. Div. 300; *National City Bank* v. *Piluso* (2nd Dept. 1943) 266 App. Div. 854].

In *People* v. *McClellan, supra*, McClellan was called upon to defend his right to the office of Mayor of the City of New York. In directing that the case be tried before a special jury, the Appellate Division observed (124 App. Div., at pp. 664-665):

> "Not only does it [the case] involve the title to the principal administrative office of the city, but it is quite probable that its decision will turn upon questions of fact. For these reasons it is proper that it should be tried before a jury specially selected."

PART TWO — FACTUAL MATERIAL RELEVANT TO QUESTIONS ARISING ON ORAL ARGUMENT

1. *Petitioners' failure to show any pattern of alleged discrimination*

Mr. Justice BLACK asked if there were any evidence of a pattern of discrimination or other indication of systematic exclusion of any class or category of qualified jurors [*cf. Wong Yim* v. *United States* (C. C. A. 9th 1941) 118 Fed. (2d) 667, cert. den. 313 U. S. 589].

The petitioners' statements concerning the occupational composition of the list of special jurors all relate exclusively to its alleged condition on one particular day, January 31, 1945 (R. 82). This list "is being revised constantly, all the time" (R. 64). The following official figures, referred to upon oral argument, disclose the turnover for the five years preceding the petitioners' survey:

Year	*Placed on List*	*Removed from List*
1940	531*	717*
1941	395*	580*
1942	329	478
1943	411	248
1944	741	669
Total	2407*	2692*

2. *State of the record as to the manner in which women were alleged to have been recruited for general jury service*

Mr. Justice REED asked whether the record entitled the petitioners to raise any question in this Court concerning the manner in which women were recruited for general jury service (*cf.* respondent's certiorari brief, p. 10).

* As result of a recheck made by the county clerk, these figures are slightly different from those given on oral argument. The totals then given were: "Placed on List," 2413; "Removed from List," 2708.

As appears from the petitioners' brief (pp. 3-4), all constitutional questions are claimed to be raised by the petitioners' objection to the district attorney's motion for a special jury (R. 27-30), by the written challenge to the panel (R. 32-4), and by the petitioners' motions to set aside the verdict and in arrest of judgment (R. 503, 506). No criticism of the method of recruiting women for general jury service is found in any of the foregoing portions of the record, the only mention of women being in the challenge to the special panel, as follows (R. 34):

> "The special jury panel selected in this case was obtained * * * by the virtual exclusion from said Jury list of trade union representatives, laboring people and women."

Moreover, the record affirmatively establishes the petitioners' satisfaction with the general panel. Their opposition to the motion for a special jury was based on the assertion that (R. 27):

> "The application for a special jury is opposed on the ground that a trial by a 'blue ribbon jury' instead of a jury chosen from the regular panel will deprive these defendants of the right to a trial by a jury in accordance with the constitutional provisions."

3. *Type of cases tried before special juries*

Mr. Justice FRANKFURTER asked what kind of crimes had, in the past, been tried before special juries.

Ninety-four non-capital cases have been tried before such juries in the Court of General Sessions of the County of New York since 1929.* Of these, thirty-seven reached the appellate courts and therefore have records available for inspection. Footnote 5 on pages 14-15 of our certiorari brief lists all such cases tried since 1938. The table

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* For capital cases, see respondent's brief, Appendix B, pp. 31-32.

below* sets forth those tried between 1929 and 1938. No accurate records are readily available for the years before that.

*People v.	Crimes Charged	Citations	Defendants' Occupations
Baird 3 defendants	larceny	232 App. Div. 743	salesmen
Glenn	perjury	262 N. Y. 493	mechanic's helper
Stiglin	perjury	238 App. Div. 407	police officer
Kaplan	coercion	264 N. Y. 675	president (Local 306 Moving Picture Operators' Union of Greater New York)
Tait	perjury	259 N. Y. 599	police officer
Marcus 3 defendants	misapplication of bank funds	261 N. Y. 268	bank officers
Kresel	misapplication of bank funds	243 App. Div. 137	lawyer
Lewis 2 defendants	attempted rape	235 App. Div. 612	police officers
King	blackmail	246 App. Div. 516	novelist
Bitz	bail jumping	265 N. Y. 619	no occupation
Dilliard	false financial statement	271 N. Y. 403	real estate
McMurrough	manslaughter	247 App. Div. 712	chauffeur
Montana	compulsory prostitution	252 App. Div. 109	betting commissioner
Commonwealth Bond Corp. 3 defendants	larceny	276 N. Y. 611	real estate corporation and officers
Murphy 9 defendants	feloniously possessing machine gun	276 N. Y. 612	various (a)
Jacobs 2 defendants	extortion	280 N. Y. 562	attorneys
Hassett	bribery	251 App. Div. 883	plumber
Clarke 3 defendants	misleading advertisements	252 App. Div. 122	mortgage servicer, ass't vice-pres. and vice-pres. (Title Guarantee & Trust Company)
Ross	extortion	251 App. Div. 809	lawyer
Smolens 18 defendants	larceny	258 App. Div. 373	various (b)

(a) plumber, 3 laborers, lather, waitress, 2 housewives, tailor

(b) 3 real estate brokers, 7 salesmen, building superintendent, farmer, club manager, chef, editor, insurance agent, title reader, publisher. This case, tried in 1938, was not listed in footnote 5, page 14 of respondent's certiorari brief because the prosecution was conducted by the Attorney General and was not reflected in the files of the district attorney's office.

4. *Westbrook Pegler*

Mr. Medina suggested that the petitioners had been embarrassed by being confronted with special jurors who were followers of Westbrook Pegler. Only seven of the eighty-nine talesmen examined on the voir dire were found to be current readers of Pegler (R. 238, 248, 252, 268, 274, 278, 305; *cf.* R. 116, 126). Six of those talesmen were excused by the court (R. 239, 249, 252, 275, 281, 306). The seventh testified that (268):

> "I agree with you [petitioners' counsel] about Mr. Pegler."

He was "satisfactory" to both sides and served on the jury (R. 269).

The judgments under review should be affirmed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
JOSEPH A. SARAFITE
Assistant District Attorneys

EUGENE A. LEIMAN
Deputy Assistant District Attorney
of Counsel

APPENDIX C

Special Jury Statutes in New York Prior to 1896

[Emphasis ours throughout.]

(A) *New York Colonial Statutes*

1. 3 Colonial Laws of New York, Ch. 720 (1741) pp. 185, 191-192:

"An Act for the Returning of Able & Sufficient Jurors, and for the better Regulation of Juries.

"For the returning more able & Sufficient Jurors, for Trials at Law hereafter to be had, and for Reformation and Abuses in Sheriffs, and other Ministers, who for Reward may be Tempted to Spare the most able, & Sufficient, and Return the Poorer and Simpler Freeholders & others Less able to descern the Causes in Question and to bear the Charges of appearance & attendance thereon.

* * *

"And be it further Enacted That It Shall & may be Lawfull for his Majestys Supreme Court of this Colony, Upon motion made, on behalf of his Majesty his Heirs or Successors, Or on the Motion of any Prosecutor or Defendant in any Indictment, or Information, in the nature of Quo Warranto depending, or to be brought or Prosecuted there, or on the motion of any Plaintiff or Plaintiffs Defendant or Defendants, in any Action Cause or Suit whatsoever depending or to be brought & carried on in the Said Court, and the Said Court is hereby Authorized & Required upon Motion as aforesaid, in any of the Cases before Mentioned, To order & appoint a Jury to be Struck before one of the Judges of the Said Court, for Trial of any Issue joined in any of the said Cases, and Triable by a Jury of Twelve Men, **in Such manner as Special Jurys have by Law heretofore been Struck for Tryals at Bar,** which Jury so Struck as Aforesaid, Shall be the Jury returned for the Trial of the Said Issue.

* * *

Appendix C

"THIS ACT to continue & remain of Force from the Said Twenty Fifth day of March Until the Twenty Fifth day of March, which will be in the Year of our Lord one Thousand Seven Hundred & Forty Seven"

2. 3 Colonial Laws of New York, Ch. 836 (1746) p. 599:

"WHEREAS an Act, Entituled an Act, for the returning of able and Sufficient Jurors, & for the better Regulation of Jurys passed in the Fifteenth year of his Majesties Reign, will expire on the Twenty Fifth of March next & the same having been found greatly advantagious to the Inhabitants of this Colony.

"BE IT ENACTED by his Excellency the Governour, the Council, & the General Assembly, And it is hereby Enacted by the Authority of the same, That the above mentioned Act, Entituled an Act for the returning of able & Sufficient Jurors & for the better Regulation of Jurys, Shall be, & hereby is continued, and every Clause, Article, Matter & Thing therein contained Enacted to be & remain of full Force & Virtue to all Intents Constructions & Purposes whatsoever, and is hereby made Perpetrual."

(B) *New York State Statutes*

1. Laws of 1786, Ch. 41, Republished Ed., pp. 273, 279-280:

"*And be it further enacted by the authority aforesaid,* That it shall and may be lawful for the said supreme court, and the several inferior courts and mayors courts herein before mentioned, upon motion, in behalf of the people of this State or of any prosecutor or defendant in any indictment or information, other than for capital offences, or of any plaintiff, demandant avowant defendant or tenant in any action cause or suit whatsoever depending, or to be had, brought, prosecuted or carried on in any of the said courts, and triable by a jury of twelve men, to order and appoint a jury to be struck for the trial thereof.

And in such case the said courts shall order the sheriff of the proper county, or other officer who ought to impanel the jury in such case to bring into the office of the clerk of the said court at a certain day a book containing the names of the several persons in his county or bailiwic qualified to serve as jurors on such trial, with their places of abode and additions; and after the return of such book the party applying for such struck jury shall give due notice to the opposite party, and to the clerk of the said court, or his deputy, of the time and place of striking such jury; **at which time and place the clerk of the said court or his deputy shall** attend with the said book, and shall in the presence of the parties, or such of them as shall attend for that purpose, **copy out of the said book the names of forty eight such persons,** with their places of abode and additions, **as he shall think most indifferent between the parties, and best qualified to try such cause or issue;** and then the party applying for such struck jury or his agent or attorney shall first strike out one of the said names, and then the opposite party or his agent or attorney another, and so alternately until each shall have struck out twelve: But if such opposite party shall not attend such striking, nor any person in his behalf, then the said clerk or his deputy shall strike for the party not attending. And when each have struck out twelve as aforesaid, the remaining twenty four shall be the jury to be returned to try the said cause or issue. And the clerk of the said court or his deputy shall thereupon make a fair copy of the names of the same remaining twenty four persons, with their places of abode and additions, and certify the same under his hand to be the list of jurors struck as aforesaid for the tryal of such cause or issue, which list shall be delivered to the sheriff or other officer who ought to summon such jury, together with the venire facias; and such sheriff or other officer shall thereupon annex the same list to such venire facias, and return the same as the panel of the jury to try such cause or issue, and summon them according to the command of the

same writ. And upon the trial of such cause or issue there shall be no balloting, but the jurors so struck shall be called as they stand upon the panel, and the first twelve of them who shall appear and are not challenged, or shall be found duly qualified and indifferent, shall be the jury and be sworn to try the said cause or issue; but the person or party who shall apply for such struck jury shall bear and pay the fees for striking thereof, and shall not have any allowance for the same upon the taxation of costs."

2. Laws of 1801, Ch. 98, Republished Ed., pp. 375, 384-385:

"XXII. *And be it further enacted*, That no struck jury shall be allowed unless on the order of the court, when they may deem it necessary by reason of the importance or intricacy of the case; and whenever they shall so deem it necessary, it shall be lawful for the supreme court or the court of common pleas or mayor's court in which the cause is depending, to order the clerk of the county to return into the office of the clerk of the said court, or if the clerk of the county be the clerk of the said court, then to have ready in his office at a certain day, a book containing the names of the several persons in his county qualified to serve as jurors on such trial, with their places of abode and additions, and after the return of such book the party applying for such struck jury shall give due notice to the opposite party, and to the clerk of the said court or his deputy, of the time and place of striking such jury, at which time and place **the clerk of the said court or his deputy shall** attend with the said book, and shall in the presence of the parties, or such of them as shall attend for that purpose, **copy out of the said book the names of forty-eight such persons with their places of abode and additions, as he shall think most indifferent between the parties and best qualified to try such cause**; and then the party applying for such struck jury or his agent or attorney, shall first strike out one of the

said names, and then the opposite party or his agent or attorney another, and so alternately until each shall have struck out twelve; but if such opposite party shall not attend such striking, nor any person in his behalf, then the said clerk or his deputy shall strike for the party not attending, and when each have struck out twelve as aforesaid, the remaining twenty-four shall be the jury to be returned to try the said cause; and the clerk of the said court or his deputy shall thereupon make a fair copy of the names of the said remaining twenty-four persons, with their places of abode and additions and certify the same under his hand to be the list of jurors struck as aforesaid for the trial of such cause or issue; which list shall be delivered to the sheriff or other officer who ought to summon such jury, together with the venire facias; and such sheriff or other officer shall thereupon annex the same list to such venire, and return the same as the panel of the jury to try such cause, and summon them according to the command of the same writ; and upon the trial of such cause there shall be no balloting, but the jurors so struck shall be called as they stand upon the panel, and the first twelve of them who shall appear and are not challenged, or shall be found duly qualified and indifferent, shall be the jury and be sworn to try the said cause; but the party who shall apply for such struck jury shall pay the fees for striking thereof, and shall not have any allowance for the same upon the taxation of costs; *Provided always*, That if the clerk of such court shall be interested in the cause or related to either of the parties, or if it shall appear probable to the court that he is not indifferent between them, then and in every such case the court shall nominate two proper persons who are indifferent between the parties to strike the jury, which persons shall do and perform every thing required to be done by such clerk relating to the striking of such jury."

[Re-enacted by Laws of 1813, Ch. 4 (R. I.) Vol. 1, pp. 325, 333-334]

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3. Revised Statutes (1829, 1st Ed.) Vol. 2, p. 418:

"*Of Special Juries.*

* * *

"§46. When it shall appear to the supreme court, or to any court of common pleas, in which any cause shall be pending, that a fair and impartial trial will be more likely to be obtained by having a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause."

* * * *

"§48. At the time appointed, the clerk of the county shall attend at his office, with the original lists of the jurors returned to him by the officers of the several towns, who are then liable to serve, and in the presence of the parties, or their counsel, shall proceed to strike a jury as follows:

"1. The clerk shall select from such lists the names of forty-eight persons, **whom he shall deem** most indifferent between the parties, and best qualified to try such cause:

"2. The party on whose application such struck jury was ordered, or his attorney, shall then first strike out one of the said names, and the opposite party or his agent shall strike out another of such names, and so alternately until each party shall have striken out twelve names:

"3. If either party shall fail to attend at the time and place of striking such jurors, or shall neglect to strike out any names according to the foregoing provisions, the clerk shall strike for such party:

"4. The clerk shall thereupon make out a list of the names of the twenty-four persons not stricken out, and certify the same to be the persons drawn to serve as jurors pursuant to the order of the court, and shall deliver such list so certified to the sheriff of the county."

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This statute remained in effect through 1896 with minor amendments. [See Revised Statutes (1836, 2nd Ed.) Vol. 2, pp. 338-339; *id.* (1846, 3rd Ed.) Vol. 2, pp. 514-515; *id.* (1852, 4th Ed.) Vol. 2, pp. 665-666; *id.* (1858, 5th Ed.) Vol. 3, pp. 716-717; *id.* (1875, 6th Ed.) Vol. 3, pp. 704-705; Code of Civil Procedure (1882, Throop Ed.) §§1063-1065, 1069, pp. 447-449.]

The amendments mentioned were as follows:

By the Revised Statutes of 1852 (4th Ed., Vol. II, p. 665) Section 46 of the Revised Statutes, *supra*, p. 19, was renumbered and amended to read as follows:

> "§56. [Sec. 46.] When it shall appear to the supreme court, or to any county court in which any cause shall be pending, that a fair and impartial trial will be more likely to be obtained by having a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause."

By the Revised Statutes of 1858 (5th Ed., Vol. 2, p. 716) this same section was further amended to read as follows:

> "§112. [Sec. 46.] When it shall appear to the supreme court, or to any county court, or to the superior court of the city of New York, or to the superior court of Buffalo, in which any cause shall be pending, that a fair and impartial trial cannot be had without a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause."

By the Laws of 1895, Ch. 946, p. 830, this same section as it appeared in the Code of Civil Procedure was further amended to read as follows:

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"§1063. *What courts may order a special jury to be struck.*—Where it appears to the court, that a fair and impartial trial of an issue of fact, triable by a jury, joined in an action, pending in the supreme court, can not be had without a struck jury, or that the importance or intricacy of the case requires such a jury, the court must make an order, upon notice, directing a special jury to be struck, for the trial of the issue. The order must specify the term, and it may specify a particular day in the term, when the jurors must attend."

This last section, subsequently incorporated into the Civil Practice Act (C. P. A., §449), remained in effect until repealed in 1937 (L. 1937, Ch. 532). However, after the special jury provision of Chapter 378 of the Laws of 1896 became available to litigants in civil as well as in criminal cases (L. 1901, Ch. 602, §5), the struck jury statute fell into disuse [see *Jerome* v. *New York Evening Journal Publishing Co.* (1st Dept. 1908) 124 App. Div. 372, 376; *People* v. *McClellan*, *id.*, pp. 664, 665].

APPENDIX D

Summary of Statutes on Property Qualifications for Jury Service in New York

A. *Colonial Statutes*

1 Colonial Laws of New York [Duke of York's Laws, 1665-1675], p. 42:

"JURORS AND JURYES.

"That the Clarke of the Sessions shall in Convenient time before the Sitting of the Court give a a Certificate to the Sheriffe or under Sheriff of what and how many Causes are entered for their hearing the next Sessions to the end the Sheriff or under Sheriff may (and are hereby required) Immediately to Issue forth warrants to the Constable of the Severall Towners of the Jurisdiction of the Court or Jurymen proportionable to the Causes with regard to the equality of the number from each Town and according to the warrant The Constable shall warn so many of **the Overseers to attend as Jurymen** and return their names to the under Sheriff, And if such Number of Jury men so required, prove not Sufficient for Carrying on the business with dispatch to the Sessions The Justices may require the Sheriffe or under Sheriffe, to Supply their number with so many **able and discreet men** as shall either attend the Court upon other occasions, or shall happen to be Inhabitants of the Towne where the Court shall be held.

* * *

"No Jury shall exceed the number of Seaven nor be under Six unless in Special Causes upon Life and Death, The Justices shall thinke fitt to Appoint twelve."

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1 Colonial Laws of New York, Ch. 66 (1699), pp. 387-388:

"A Bill for ye Regulating and returning of able and Sufficient Jurors in Tryalls at Law

[Passed, May 16, 1699.]

"Whereas great hurt & damage does arise to ye Inhabitants of this province by reason of ye great abuses in ye returning of Jurors not Sufficiently qualified to discern ye Causes in question upon Tryalls between party & party That ye Same for ye future may be remedyed & y't able & Sufficient Jurors for Tryalls hereafter to be had may be duely returned by ye Sheriffs & other officers authorized for y't service BEE IT ENACTED * * * **that all Jurors** who are to be returned for ye tryalls of Issues Joined in any of his Ma'tys Supream or Inferiour Court or Courts of May'rs & Aldermen within this province who shall have Conginzance of any please of his Ma'tys Courts of Kings Bench Comon pleas or Exchequer or before any Justices of Assize or nisi-prius Oyer and Terminer Goale Delivery or Generall or quarter Sessions of ye peace from & after ye publication hereof in any Citty or County of this province **shall every of them then have in their owne name and right a good house or message with tenn acres of Land of ffreehold (in ye respective Countys wherein they doe reside & in ye Cittys of New York & Albany one dwelling house free from all Incumbrances or a personall Estate to ye value of ffifty pounds Currant money of this province free & Cleer from all debts** & Lawfull demands whatsoever in ye Same Citty towne & County where Such Jurors shall reside all w'ch persons haveing Such Estate in manner aforesaid are hereby Enabled and made Liable & Sufficiently qualified to be returned and to Serve as Jurors for ye tryalls of Issues before ye Justices & Courts aforesaid any Law or Statute to ye Contrary notwithstanding and if any person of a lesser Estate and Value shall be respectively returned upon any Such Jury or tales in Default of Such Jurors it shall be a good Cause of

Challenge and ye party returned shall be discharged upon ye Said Challenge or his owne Allegation & Oath thereof & y't ye Same hereafter may be duely observed. The Writt of Venire facias w'ch shall hereafter be awarded and Directed for ye Impanneling of Juryes in Cases aforesaid w'thin any Citty & County w'thin this province shall have menconed in ye body thereof twelve free & Lawful men of ye Neighbourhood of w'ch **each of y'm shall have in their owne Name and right a good house or message w'th tenn Acres of Land of ffrehold in ye County & ye Cittys of New York & Albany a dwelling house free from all Incumbrance or a personall Estate to ye Value of fifty pounds free & Cleer from all Debts & Lawfull demands w'tsoever** and ye preamble and residue of ye Said Writt shall be after ye usuall manner and y't upon every Such Writt & writts of Venire, facias the Sheriff Coroner or other minister of each respective Citty and County in this province unto whom ye makeing of ye pannell Shall appertaine Shall not returne any person in any Such pannell unless he Shall then have ye Estate as aforesaid respectively in ye Same Cittys & Countys where ye Issue is to be tryed. • • •

This act remained in effect until 1733 [see 1 Colonial Laws of New York, Ch. 214 (1710) p. 708; *id.*, Ch. 367 (1719) p. 1021; 2 *id.*, Ch. 493 (1726) p. 345]. Apparently no statute prescribing qualifications for jurors was ineffect from 1733 to 1741.

In 1741 a new statute was enacted which made the property qualification for jurors sixty pounds [3 Colonial Laws of New York, Ch. 720 (1741) p. 185], which application remained in effect until after formation of the Union [*id.* (1746) Ch. 836, p. 599].

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B. *Laws of State of New York*

Laws of 1786, Ch. 49, Republished Ed., pp. 273, 275:

"IX. **And be it further enacted by the authority aforesaid,** That all jurors (other than strangers upon trials per medietatem linguae) who shall be returned upon trials of issues in the supreme court, or in any of the circuit courts, or in any of inferior courts of common pleas, or in the mayors courts of the cities of New York, Albany or Hudson; or in any court of general or quarter sessions of the peace, or before any justices of assize, oyer and terminer or goal delivery in any city or county of this State, or in any other court of record, shall every of them be above the age of twenty one and under the age of sixty years and shall each of them have in either of the said counties in his own name or right, or in trust for him or in his wifes right in the same county, **a freehold in lands messuages or tenements, or of rents in fee or for life, of the value of sixty pounds, free of all reprizes debts demands or incumbrances whatsoever; and in the cities of New York Albany or Hudson a freehold of the value aforesaid, or a personal estate of the like value free from all reprises debts, demands or incumbrances whatsoever.** And all men having such estates as aforesaid are hereby enabled and made liable to be returned and to serve as jurors for the trials of issues before the judges, justices, and courts aforesaid; and if any man not so qualified shall be returned upon any such jury, or tales in default of such jurors, it shall be good cause of challenge to the juror not so qualified, and such person so returned shall be discharged upon such challenge or his own allegation and oath thereof • • •"

In 1801 (Laws of 1801, Ch. 98, 2d Ed., pp. 377-378), the property qualification became freehold or personal estate of the value of $150 free of all reprises, common debts,

demands or incumbrances whatsoever. The amount remained the same in 1813 [Laws of 1813, Ch. 4 (R. L.), pp. 327-328]. In 1829, the amount was $250 in personal property or a freehold estate valued at $150 [2 Revised Statutes (1829, 1st Ed.) p. 411]. This property qualification continued until 1882 [2 Revised Statutes (1836, 2nd Ed.) p. 332; 2 Revised Statutes (1846, 3rd Ed.) p. 508; 2 Revised Statutes (1852, 4th Ed.) p. 656; 3 Revised Statutes (1859, 5th Ed.) p. 695; 3 Revised Statutes (1875, 6th Ed.) p. 676]. In 1882, the property qualification in New York County was real or personal property of the value of $250 [Code of Civil Procedure (Throop Ed. 1882) §1079, p. 454]. Since that time, this qualification has remained unchanged [Judiciary Law, §596 (1946)].

APPENDIX E

Summary of Exemptions from Jury Service by Statute in New York

Periods and Statutes	*Exempt Groups*
1786-1801 [L. 1786, ch. 41, p. 282]	Firemen of New York, Brooklyn and Albany.
1801-1829 [L. 1801, ch. 97, p. 224, *id.* (1813) ch. 4, p. 335]	State militiamen and commissioned officers of the same within the City of New York; firemen; State prison inspectors; wardens of the Port; health commissioners; agents, superintendents, artificers and workmen of every kind employed in and about Albany Glass Factory; Quakers or reputed Quakers in trials of treason or murder.
1829-1846 [1 *Rev. Stat.* (1829, 1st Ed.) pp. 250, 278, 324; 1 *id.* (1836, 2d Ed.) pp. 233, 269, 317, 639]	Toll collectors, clerks, repair superintendents, lock-tenders, boat inspectors and weigh-masters employed on canals; superintendent, inspector, deputies and all persons employed in manufacture of coarse salt; non-commissioned officers, musicians and privates of State militia; keepers of poor houses, alms-houses and other such places.
1846-1859 [1 *Rev. Stat.* (1846, 3d Ed.) pp. 282, 318, 362, 797-798, 410; 2 *id.* 511, 512; 1 *id.*	Same as from 1829 to 1846. In addition: firemen; persons in employ of any glass, cotton, linen, woolen or iron

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 452

JAMES BOVE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOSES POLAKOFF,
Counsel for Petitioner.

SAMUEL MEZANSKY,
Of Counsel.

York, New York County, it was stipulated that an objection by either counsel for the petitioner, Joseph S. Fay or the petitioner, James Bove shall apply to both petitioners, unless specifically stated by counsel at the time (fols. 438-439).

The petitioner raised the Federal questions sought to be reviewed in the same manner as raised by the petitioner, Joseph S. Fay.

Petitioner's counsel objected to an order directing that the petitioner be tried before a Special Jury (fols. 175-182). Petitioner, through his counsel, filed a written challenge to the Special Jury Panel (fols. 182-195), in accordance with Sections 362-363 of the Code of Criminal Procedure of the State of New York.

Petitioner's notice of appeal specifically brought up for review the order of the trial justice directing trial by a Special Jury and the order overruling the challenge to the special panel of jurors (fols. 10-15).

In the interest of brevity and to avoid repetition, your petitioner does not in this petition recite the facts which appear fully in the petition of Joseph S. Fay.

Your petitioner adopts these facts and also the reasons urged in the petition of Joseph S. Fay for the granting of the petition.

Your petitioner also urges for the reasons more fully set forth in the petition of Joseph S. Fay that the trial of your petitioner before a Special Jury in the manner set forth in the petition of Joseph S. Fay violated petitioner's fundamental constitutional rights and privileges.

Conclusion

It is therefore respectfully submitted that this petition be consolidated with the petition of Joseph S. Fay, docketed on the 9th day of August, 1946, and bearing Docket No. 377

and that this petition for a writ of certiorari be granted.
Dated, New York, N. Y., August 30th, 1946.

Respectfully submitted,

MOSES POLAKOFF,
Attorney for Petitioner.

SAMUEL MEZANSKY,
Of Counsel.

(6447)

(1852, 4th Ed.) pp. 518, 553, 630; 2 *id.* pp. 24, 660, 662]	manufacturing company, by the year, month or season; ministers of the gospel; teachers in any college or academy; practising physician with patients requiring his attention; surrogate, justice of the peace or employe in civil office with duties inconsistent with jury attendance; teacher in any school.
1859 to 1875 [1 *Rev. Stat.* (1859, 5th Ed.) pp. 639, 680, 772; 2 *id.* 855, 1011; 3 *id.* 700, 713, 714]	Same as from 1829 to 1859. In addition: policemen.
1875 to 1882 [1 *Rev. Stat.* (1875, 6th Ed.) pp. 705, 731, 813; 2 *id.* 636, 848, 855, 872, 929, 1026; 3 *id.* 676, 701]	Same as from 1829 to 1875. In addition: operators, clerks and other persons employed by telegraph companies; resident officers and teachers in lunatic asylums; those who observe the Sabbath on Saturday exempt on that day from service.
1882 to 1889 [1 *Rev. Stat.* (1882, 7th Ed.) pp. 703, 732, 786, 859, 893, 910; 2 *id.* 1723, 1729; 3 *id.* 1867, 1910, 1935, 1976, 2619, 2621; *Code of Civil Procedure* (1882, Throop Ed.) §1081, pp. 454-455; 1 *Rev. Stat.* (1889, 8th Ed.) pp. 777, 812; 2 *id.* 858, 991; 3 *id.* 2064, 2120, 2181; 4 *id.* 2819]	Same as from 1829 to 1882. In addition: prison guards; licensed pharmacists; attorneys; consuls; ship officers and pilots; railroad superintendents, conductors and engineers.

Appendix E

1889 to 1909 [L. 1889, ch. 296, pp. 370-371; L. 1898, ch. 318, p. 941; L. 1905, ch. 437, p. 971]	Same as from 1829 to 1889. In addition: veterans of 5 years' service in national guard; surgeon dentist; and editor, editorial writer, artist or reporter of a daily newspaper or press association.
1909 to 1917 [Consolidated Laws of 1909, §635; Judiciary Law (1917 Ed.) §635]	In 1909, the parent statute of the present Judiciary Law, §599, set forth the following exemptions: clergymen; physicians; dentists; pharmacists; veterinary surgeons; embalmers; attorneys; teachers; office holders under local, State or Federal government; consuls; ship officers and pilots; railroad and telegraph employes; veterans of 7 years' service; members of national guard; firemen; policemen and steam boiler engineers.
1917 to 1936 [L. 1921, ch. 703, p. 2485; L. 1935, ch. 771, p. 1497; L. 1936, ch. 890, p. 1998]	Same as 1909 to 1917. In addition: optometrists; volunteer firemen; members of army, navy or marine corps of the United States.
1936 to present [L. 1936, ch. 890, pp. 1996-1997; L. 1937, ch. 513, p. 1173; L. 1943, ch. 447, p. 1009]	In 1936, all former exemptions were repealed. Only groups exempted henceforth were: clergymen; physicians; dentists; pharmacists; embalmers; optometrists; attorneys; members of the army, navy or marine corps; firemen; policemen; ship officers and pilots. In 1937, women were added. In 1943, editors, editorial writers, sub editors, reporters and copy readers were added.

Appendix E

April 7, 1943 to April 1, 1946

Article IX-A of the New York State War Emergency Act provided for the excuse from jury service of war workers and military personnel [L. 1943, Ch. 361; repealed by L. 1946, Ch. 445]:

"§95. Purpose and application of article

"It is the purpose of this article to prevent any interruption in the production and flow of materials necessary for the successful prosecution of the existing state of war by establishing a uniform, state-wide procedure to be followed by persons who are engaged in the production and movement of such materials in obtaining excuse from jury service without personally appearing in court to present their applications to be excused from such service. The provisions of this article shall apply to all persons hereafter summoned or notified to attend as grand jurors or trial jurors in any court of the state who are necessary employees in essential war industries or occupations or who are members of the armed forces of the United States or of any auxiliary thereof.

"§96. Notice containing special instructions for obtaining excuse from jury service to accompany all jury duty summonses and notices hereafter served

"It shall be the duty of the commissioner of jurors, the sheriff and of every other public officer or body charged with the duty of summoning persons to attend for service as grand jurors or trial jurors in any court of this state to send to or serve upon each person hereafter summoned for such service, a notice which shall accompany such summons, be annexed thereto, or endorsed thereon, and which shall be in substantially the following form:

Appendix E

"SPECIAL INSTRUCTIONS FOR OBTAINING EXCUSE FROM JURY SERVICE WITHOUT PERSONAL APPEARANCE IN COURT

"A. For Necessary Employees in Essential War Industries and Occupations

"If you are a necessary employee in an essential war industry or occupation, you may be excused from attending for service as a juror as required by the (here insert enclosed or attached) summons, or have your time of service postponed, by complying with the following instructions:

• • •

"4. Send the application, together with the jury summons or notice, by mail or messenger, to (here insert name and address of presiding judge of court) not later than 2 p. m. on the Wednesday preceding the date specified in the summons for your appearance.

"IT IS NOT NECESSARY FOR YOU TO APPEAR IN COURT PERSONALLY TO PRESENT YOUR EXCUSE. You or your representative will be notified of the action taken upon your application prior to the time specified in the summons for your appearance in court. A denial of your application will not prevent you from presenting to the court at the time specified for your appearance therein an application to be excused from jury service on any ground set forth in your application under this section or for any other reason or cause.

• • •

"**§98. Inconsistent acts superseded**

"All acts and parts of acts inconsistent with the provisions of this act are hereby superseded and suspended in their operation for the period during which this article remains in effect."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 452

JAMES BOVE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James Bove, respectfully prays that a writ of certiorari issue to review the final order and judgment of the Court of Appeals of the State of New York

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* References are to the folios of the record filed with this Court in *Joseph S. Fay, Petitioner,* v. *The People of the State of New York,* October Term, 1946, No. 377, docketed August 9th, 1946.

(fols. 3553-3561)*, rendered on July 23, 1946 (upon which a final judgment was entered in the office of the Clerk of the County of New York on the 8th day of August, 1946—fols. 3562-3569), which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on the 20th day of December, 1945 (fols. 3508-3513), affirming a judgment of the trial court, the Supreme Court of the State of New York, New York County, entered on the 5th day of April, 1945 (fols. 2-5, 81-82).

Opinions of the State Courts

The trial court rendered no opinion except the memorandum of Mr. Justice Munson on order denying defendants' motion for a bill of particulars (fols. 193a-195d), and the memorandum opinion of Mr. Justice Wasservogel granting a certificate of reasonable doubt (fols. 3475-3483).

The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, rendered a *per curiam* opinion (fols. 3517-3531), two of the justices of said Court dissenting in an opinion (fols. 3532-3542).

The Court of Appeals of the State of New York rendered no opinion.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. C. A. Sec. 344).

Questions Presented

The question presented is whether the trial and conviction of petitioner for the commission of a crime by a jury from which women and laborers were largely, systematically, and intentionally excluded, denied to petitioner his rights under

the Fourteenth Amendment to the Constitution of the United States.

Summary Statement of Matter Involved

The grounds urged for the granting of this petition are the same as the grounds urged for the granting of a petition for a writ of certiorari filed by Joseph S. Fay as petitioner against The People of the State of New York, No. 377, docketed on the 9th day of August, 1946 (October Term, 1946).

Your petitioner was a co-defendant with said Joseph S. Fay in the same criminal proceeding which resulted in the final order and judgment of the Court of Appeals of the State of New York (fols. 3553-3561), rendered on July 23rd, 1946.

Your petitioner was tried together with said petitioner, Joseph S. Fay. Your petitioner was also convicted and joined with the petitioner, Joseph S. Fay in all the appeals taken and described in the petition of Joseph S. Fay resulting in the final order and judgment of the Court of Appeals of the State of New York upon which a final judgment was entered in the office of the Clerk of the County of New York on the 8th day of August, 1946, which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on the 20th day of December, 1945 (fols. 3508-3513), which affirmed a judgment of the trial court, the Supreme Court of the State of New York, New York County, entered on the 5th day of April, 1945 (fols. 2-5, 81-82). The record in the above proceeding heretofore filed by the petitioner, Joseph S. Fay, is also the complete record of the trial of your petitioner.

Upon the trial of your petitioner and the petitioner, Joseph S. Fay at the Supreme Court of the State of New

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 377, 452

JOSEPH S. FAY and JAMES BOVE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF FOR PETITIONER JAMES BOVE

MOSES POLAKOFF,
Attorney for Petitioner.

SAMUEL MEZANSKY,
JACK M. PERLMAN,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 377, 452

JOSEPH S. FAY and JAMES BOVE,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR PETITIONER JAMES BOVE

I

The Opinions of the Courts Below

The *Per Curiam* opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 521), is officially reported at 270 App. Div. 261, 59 N. Y. S. (2d) 127.

The Court of Appeals of the State of New York affirmed the judgment of the Appellate Division without opinion and its memorandum of the case is officially reported at 296 N. Y. 510. In this memorandum, as well as in its remittitur (R. 533-534), the Court of Appeals stated: "Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: The defendants argued that the decision of the Trial Court in granting the motion of the People for a special jury and in overruling the challenge of defendants to the special jury panel constituted a denial of due process and a violation of their rights under the Fourteenth Amend-

ment of the Constitution of the United States. This Court held that the granting of the motion of the People for a special jury and the overruling of the challenge of the defendants to the special jury panel was not a denial of due process or a violation of defendants' rights under the Fourteenth Amendment to the Constitution of the United States."

II

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. C. A. Par. 344).

III

Summary Statement of the Case

The petitioner Bove was a co-defendant with the petitioner Joseph S. Fay in the same criminal proceeding which resulted in the final order and judgment of the Court of Appeals of the State of New York (R. 533-534), rendered on July 23, 1946.

The petitioner Bove was tried together with the petitioner Joseph S. Fay. The petitioner Bove was also convicted and joined with the petitioner Joseph S. Fay in all the appeals taken and described in the brief of Joseph S. Fay, resulting in the final order and judgment of the Court of Appeals of the State of New York, upon which the final judgment was entered in the Office of the Clerk of the County of New York, on the 8th day of August, 1946 (R. 535-536), which affirmed the judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on the 20th day of December, 1945, which affirmed the judgment of the Trial Court, the Supreme Court of the State of New York, New York County, entered on the 5th day of April, 1945. The record in the above proceeding heretofore filed by the petitioner Joseph S. Fay is also the complete record of the trial of your petitioner.

Upon the trial of the petitioner Bove and the petitioner Joseph S. Fay at the Supreme Court of the State of New York, New York County, it was stipulated that any objection by either counsel for the petitioner Joseph S. Fay or the petitioner James Bove was applied to both petitioners unless specifically stated by counsel at the time (R. 90).

The petitioner Bove raised the several questions sought to be reviewed in the same manner as raised by the petitioner Joseph S. Fay. Petitioner's counsel objected to an order directing the petitioner to be tried before a Special Jury (R. 27-30).

The petitioner Bove through his counsel filed a written challenge to the Special Jury Panel (R. 32-34) in accordance with Sections 362-363 of the Code of Criminal Procedure of the State of New York. The petitioner's Notice of Appeal specially brought up for review the order of the Trial Court directing trial by a Special Jury and the order overruling the challenge to the Special Panel of Jurors (R. 3-4).

A full and complete statement of the case is set forth on pages 2 through 15 of the brief submitted on behalf of the petitioner Joseph S. Fay. In the interest of brevity and to avoid repetition, your petitioner will, therefore, not recite again those facts. The petitioner Bove adopts the specification of errors set forth at pages 15 through 17 of the brief submitted on behalf of petitioner Joseph S. Fay, as well as the arguments and points contained in that brief.

CONCLUSION

The Judgment Appealed From Should Be Reversed

Respectfully submitted,

Moses Polakoff,
Attorney for Petitioner.

Samuel Mezansky,
Jack M. Perlman,
of Counsel.

SUPREME COURT OF THE UNITED STATES

Nos. 377 AND 452.—OCTOBER TERM, 1946.

377	Joseph S. Fay, Petitioner, v. The People of the State of New York.	On Writs of Certiorari to the Court of Appeals of the State of New York.
452	James Bove, Petitioner, v. The People of the State of New York.	

[June 23, 1947.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

These cases present the same issue, a challenge to the constitutionality of the special or so-called "blue ribbon" jury as used by state courts in the State and County of New York.

Such a jury found Fay and Bove guilty of conspiracy to extort and of extortion. Bove was Vice-President of the International Hod Carriers, Building and Common Laborers' Union of America. Fay was Vice-President of the International Union of Operating Engineers. The City of New York awarded contracts for construction of an extensive project known as the Delaware Water Supply system to several large construction concerns. It was not denied that Fay and Bove collected from these contractors upwards of $300,000. But it was denied that payment was induced by threats to do unlawful injury to person or property. The defense claimed that the payments were voluntary—bribes, perhaps, but not extortion—that these men were paid merely for undertaking to assist the contractors to avoid labor trouble, to prevent jurisdictional or unauthorized strikes, and to "handle the labor situation," and that Fay and Bove rendered service as agreed.

The indictment charged the crimes in seven counts. One was dismissed by the court; the remaining six were submitted to the jury. The jury acquitted the defendants

on three of the counts, disagreed on another, and convicted on two counts. The convictions were affirmed on appeal by the Appellate Division of the Supreme Court,[1] which reviews both law and fact,[2] and by the Court of Appeals.[3] No federal question is raised as to the merits of the finding of guilt and we are to assume that the convictions were warranted by the evidence and, except for questions as to the special jury, were regular. While there was challenge to the panel from which this jury was drawn, on ground of denial of federal due process and equal protection, each individual juror was accepted by the defendants without challenge for cause. The challenge to the special jury panel was not discussed by either of the appellate courts of the State but the federal questions were sufficiently and timely raised throughout and were overruled by all state courts. A dual system of juries presents easy possibilities of violation of the Fourteenth Amendment and we took these cases by certiorari to examine the charges of unconstitutionality. 329 U. S. 697.

The question is whether a warranted conviction by a jury individually accepted as fair and unbiased should be set aside on the ground that the make-up of the panel from which they were drawn unfairly narrows the choice of jurors and denies defendants due process of law or equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. If answered in the affirmative, it means that no conviction by these special juries is constitutionally valid, and all would be set aside if the question had been properly raised at or before trial.

The defendants raise no question as to the constitutionality of the general statutes of New York which prescribe the qualifications, disqualifications and exemptions

[1] 270 App. Div. 261, 59 N. Y. S. 2d 127.

[2] Code of Criminal Procedure, §§ 520, 543-a, 66 McKinney's Consolidated Laws of New York, part 2, 328-29, 429.

[3] 296 N. Y. 510, 68 N. E. 2d 453.

for ordinary jury service. Neither is any question raised as to the administration of these general statutes by which the population of New York County, numbering some 1,800,000, is sifted to produce a general jury panel of about 60,000, unless it be that there is discrimination against women.[4] It is from this panel that defendants insist, apart from any objection they may have as to improper exclusion of women even from the general panel, they had a constitutional right to have their trial jury drawn. The statutes advanced as a standard may be roughly summarized:

To qualify as a juror, a person must be an American citizen and a resident of the county; not less than 21 nor more than 70 years old; the owner or spouse of an owner of property of the value of $250; in possession of his or her natural faculties and not infirm or decrepit; not convicted of a felony or a misdemeanor involving moral turpiture; intelligent; of sound mind and good character; well-informed; able to read and write the English language understandingly.[5] From those qualified the following classes are exempt from service; clergymen, physicians, dentists, pharmacists, embalmers, optometrists, attorneys, members of the Army, Navy or Marine Corps, or of the National Guard or Naval Militia, firemen, policemen, ship's officers, pilots, editors, editorial writers, sub-editors, reporters and copy readers.[6]

Women are equally qualified with men,[7] but as they also are granted exemption,[8] a woman drawn may serve or not, as she chooses.

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[4] But 7,000 of the 60,000 on the general jury panel, or 11%, are women. It is almost frivolous to assert that there is a bias against their inclusion on juries. *Cf. Akins* v. *Texas*, 325 U. S. 398, 403.

[5] Judiciary Law, § 596, 29 McKinney's Consolidated Laws of New York (pocket part) 131–32.

[6] Judiciary Law, § 599, 29 McKinney's Consolidated Laws of New York (pocket part) 133–34.

[7] Judiciary Law, § 596, *supra*.

[8] Judiciary Law, § 599, *supra*.

The attack is focused upon the statutes and sifting procedures which shrink the general panel to the special or "blue ribbon" panel of about 3,000.

Special jurors are selected from those accepted for the general panel by the county clerk, but only after each has been subpoenaed for personal appearance and has testified under oath as to his qualification and fitness.[9] The statute prescribes standards for their selection by declaring ineligible and directing elimination of these classes: (1) All who have been disqualified or who claim and are allowed exemption from general service. (2) All who have been convicted of a criminal offense, or found guilty of fraud or misconduct by judgment of any civil court. (3) All who possess such conscientious opinions with regard to the death penalty as would preclude their finding a defendant guilty if the crime charged be punishable with death. (4) All who doubt their ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence uninfluenced by any such opinion or impression, or whose opinion of circumstantial evidence is such as would prevent their finding a verdict of guilty upon such evidence, or who avow such a prejudice against any law of the State as would preclude finding a defendant guilty of a violation of such law, or who avow such a prejudice against any particular defense to a criminal charge as would prevent giving a fair and impartial trial upon the merits of such defense, or who avow that they cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendants' neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.[10]

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[9] Judiciary Law, § 749-aa3, 29 McKinney's Consolidated Laws of New York 512–13.

[10] Judiciary Law, § 749-aa2, 29 McKinney's Consolidated Laws of New York 512.

The special jury panel is not one brought into existence for this particular case nor for any special class of offenses or type of accused. It is part of the regular machinery of trial in counties of one million or more inhabitants. In its sound discretion the court may order trial by special jury on application of either party in a civil action and by either the prosecution or defense in criminal cases. The motion may be granted only on a showing that "by reason of the importance or intricacy of the case, a special jury is required" or "the issue to be tried has been so widely commented upon . . . that an ordinary jury cannot without delay and difficulty be obtained" or that for any other reason "the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury." [11]

This special jury statute is not recent nor is the practice under it novel. The progenitor of this statute, like it in all pertinent respects, was enacted in 1896 but was repealed and simultaneously reenacted in substantially its present form in 1901.[12] It was soon attacked as on its face violating the State Constitution. The claim of one convicted by a special jury that it was an unconstitutional body because its restrictive composition denied due process of law, was rejected by the Court of Appeals in a well-considered opinion. *People* v. *Dunn*, 157 N. Y. 528, 52 N. E. 572 (1899). The attack then was made from the opposite direction. One convicted by an ordinary jury claimed that it was an unconstitutional body. This claim that the special panel had withdrawn twenty-five hundred "men of presumably superior intelligence," 162 N. Y. at 362, 56 N. E. at 759, too, was rejected by the Court of Appeals. *People* v. *Meyer*, 162 N. Y. 357, 56 N. E. 758 (1900).

[11] Judiciary Law, § 749-aa4, 29 McKinney's Consolidated Laws of New York 513-14.

[12] N. Y. Laws 1896, c. 378; N. Y. Laws 1901, c. 602.

Then, in 1901, an attack on the constitutionality of the statute was rejected by this Court. One Hall had been convicted of murder by a special jury and sentenced to death. He sued out a writ of *habeas corpus* which was denied below. He challenged the special panel and claimed that his conviction by its verdict was a denial of due process of law and of equal protection of the laws in violation of the Fourteenth Amendment because the jury was "taken from a particular body of citizens and not from the general body of the county as was provided in all cases wherein such special jury was not drawn." This Court affirmed, *Hall* v. *Johnson*, 186 U. S. 480, citing among other authorities *Brown* v. *New Jersey*, 175 U. S. 172, which upheld a state statute for a "struck jury." [13]

Since these decisions, the special jury has been in continuous use in New York County in important cases. The District Attorney cites over one hundred murder convictions, on verdict of the special jury, considered by the Court of Appeals which affirmed judgments of death. We are asked, however, to reconsider the question and, in the light of more recent trends of decision and of particular facts about the present operation of the jury system not advanced in support of the argument in the earlier case, to disapprove the special jury system.

We fail to perceive on its face any constitutional offense in the statutory standards prescribed for the special panel. The Act does not exclude, or authorize the clerk to exclude, any person or class because of race, creed, color or occu-

[13] The other cases cited in the *per curiam* affirmance were *Storti* v. *Massachusetts*, 183 U. S. 138, 141, and *Andrews* v. *Swartz*, 156 U. S. 272, both of which disapprove the use of *habeas corpus* as a substitute for writ of error. It is not clear, therefore, how much the affirmance of the *Hall* case depended on that procedural ground rather than on a disposition of the merits. Moreover, the grounds urged against the special jury in that case related to its selection from a panel which was only a segment of the general panel and did not assert the exclusion of particular groups.

pation. It imposes no qualification of an economic nature beyond that imposed by the concededly valid general panel statute. Each of the grounds of elimination is reasonably and closely related to the juror's suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized. Not all of the grounds of elimination would appear relevant to the issues of the present case. But we know of no right of defendants to have a specially constituted panel which would include all persons who might be fitted to hear their particular and unique case. This panel is for service in a wide variety of cases and its eliminations must be judged in that light. We cannot overlook that one of the features which has tended to discredit jury trials is interminable examination and rejection of prospective jurors. In a metropolis with notoriously congested court calendars we cannot find it constitutionally forbidden to set up administrative procedures in advance of trial to eliminate from the panel those who, in a large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain the disqualifications. Many of the standards of elimination which the clerk is directed to apply in choice of the panel are those the court would have to apply to excuse a juror on challenge for cause.

These are matters with which local authority must and does have considerable latitude to cope, for they affect the administration of justice which is a local responsibility. For example, in this case the time of the trial court and its entire retinue of attendants was taken while eighty-nine prospective jurors were examined. How many more would have been examined if the clerk had not already eliminated those who admit that they would not give defendants benefit of the rule that their neglect or refusal to testify in their own behalf would not create a presumption against them? Neither of these defendants saw fit

to take the witness stand. The defendants themselves have complained of the exceptional publicity given to the charges in this case. How many more jurors would have been examined if the clerk had not already eliminated those who felt themselves subject to influence by publicity? These are practical matters in administering justice in which we will take care not to hamstring local authority by artificial or doctrinaire requirements.

It has consistently been held that a jury is not rendered constitutionally invalid by failure of the statute to set forth any standards for selection. *Murray* v. *Louisiana*, 163 U. S. 101, 108; *Franklin* v. *South Carolina*, 218 U. S. 161, 167–68; *Akins* v. *Texas*, 325 U. S. 398, 403; see also *Ex parte Virginia*, 100 U. S. 339, 348. We find nothing in the standards New York has prescribed which, on its face, is prohibited by the Constitution. There remain, however, more serious questions as to whether the special jury Act has been so administered as to deny due process to the defendants and whether the dual system of jury panels as administered denied equal protection of the laws.

As to the actual results of application of the statute, the litigants are in controversy. The New York courts, doubtless influenced by the fact that long ago they had upheld similar statutes, made no findings of fact and wrote no opinion on the subject. It is to be regretted that we must deal with questions of fact without aid of findings by the courts whose experience with the system and proximity to the local conditions with which the special jury customs are so interwoven would entitle their findings to very great weight. We would, in any case, be obliged on a constitutional question to reach our own conclusions, after full allowance of weight to findings of the state courts, and in this case must examine the evidence. *Norris* v. *Alabama*, 294 U. S. 587, 590; *Lisenba* v. *California*, 314 U. S. 219, 237–38; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 148.

The allegations of fact upon which defendants ask us to hold these special panels unconstitutional come to three: (1) That laborers, operatives, craftsmen, foremen and service employees were systematically, intentionally and deliberately excluded from the panel. (2) That women were in the same way excluded. (3) That the special panel is so composed as to be more prone to convict than the general panel.

(1) The proof that laborers and such were excluded consists of a tabulation of occupations as listed in the questionnaires filed with the clerk. The table received in evidence is set out in the margin.[14] It is said in criti-

[14] The table was prepared at the request of petitioners' counsel by an attorney who testified that he "found various occupations listed" and "tried to classify them to groups, making them not too numerous."

Total number of special jurors on file in New York County Clerk's Office	2,911
Total number with classifiable occupations	2,743
Auditors and accountants	166
Bankers	170
Manufacturers	106
Real Estate Brokers	117
Retired	62
Architects and engineers	229
Educators, teachers, librarians	27
Executives, managers of industrial enterprises	470
Stock brokers	185
Salesmen, promoters of business enterprises and advertising men	438
Newspaper men, editorial writers and others engaged in the dissemination of information	148
Mechanics	5
Insurance men	166
Travel agency men	10
Civil service employees	21
Office clerks	94
Retail merchants	144
Entertainers	26
Building and construction superintendents	70
Chemists and physicists	66

cism of this list that it shows the industry in which these persons work rather than whether they are laborers or craftsmen; that is, "mechanics" may be and probably are also laborers; "bankers" may be clerks. Certainly the tabulation does not show the relation of these jurors to the industry in which they were classified, as, for example, whether they were owners or finahcially interested, or merely employees. It does not show absence or exclusion of wage earners or of union members, although none listed themselves as "laborers," for several of these classes are obviously of the employee rather than the entrepreneur character. One of petitioners' tables showed that 38% of the special panel were "clerical, sales, and kindred workers." Three of those examined as jurors in this case were members of labor unions. Two were peremptorily challenged by the People and the one accepted by the prosecution was challenged by the defense.

It is sought to give significance to this exhibit showing the breakdown into occupations of some 2,700 special jurors, however, by reference to a tabulation of occupations of some 920,000 employees and persons seeking employment in Manhattan. The comparison is said to show a great disparity between the percentage of jurors of each occupation represented on the jury list of 1945 and

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Attorneys	5
Laborers	None
Labor union representatives	1
Housewives	20

—There are only about 30 women on the entire special jury list—

Petitioners' attorneys requested the Bureau of Labor Statistics of the United States Department of Labor to conform the classifications of the above table to the Census classifications. In the table thus prepared, twenty-one persons are classed as civil service employees and a note cautions that "Some members of this group undoubtedly belong elsewhere, as under service trades, or laborers." One hundred and sixty-five persons are listed as unclassifiable in the Bureau's table.

the occupational distribution of the number of employed persons or experienced persons seeking employment in Manhattan in 1940. This table was not put in evidence but is reproduced in the margin.[15] Apart from the dis-

[15]

OCCUPATIONS OF EMPLOYED PERSONS (EXCEPT ON PUBLIC EMERGENCY WORK) AND OF EXPERIENCED WORKERS SEEKING WORK, RESIDING IN MANHATTAN IN THE WEEK OF MARCH 24 TO 30, 1940, COMPARED WITH OCCUPATIONS OF SPECIAL JURORS ON FILE IN NEW YORK COUNTY CLERK'S OFFICE, JANUARY 31, 1945.

Occupation	Experienced Labor Force [a]						Special Jurors
	Total			Males			
	Total	Employed [c]	Seeking work, experienced	Total	Employed [c]	Seeking work, experienced	
	A	B	C	D	E	F	G
Total [b]	921,163	778,302	142,961	588,431	489,618	99,813	2,004
Professional and semiprofessional	111,600	98,343	13,257	81,191	73,416	7,775	501
Proprietors, managers and officials	85,989	81,234	4,755	73,732	69,509	4,223	1,146
Clerical, sales and kindred workers	196,027	169,056	26,971	113,316	96,853	16,463	1,012
Craftsmen, foremen and kindred workers	70,497	54,217	16,280	67,504	51,618	15,886	5
Operatives and kindred workers	156,581	128,253	28,328	98,493	79,562	18,931	.....
Service workers	234,366	216,002	37,903	131,112	110,157	20,955	.....
Laborers, except farm	45,375	29,869	15,506	44,579	29,297	15,285	.....
Farmers, farm managers, farm laborers	329	228	301	305	210	295	.....
	Percent			Percent			
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Professional and semiprofessional	12.1	12.6	9.3	10.4	10.9	7.8	18.8
Proprietors, managers and officials	9.3	10.4	3.3	12.5	14.2	4.2	43.0
Clerical, sales and kindred workers	21.3	21.7	18.9	19.1	19.6	16.5	38.0
Craftsmen, foremen and kindred workers	7.7	7.0	11.4	11.4	10.5	15.9	0.2
Operatives and kindred workers	17.0	16.5	19.8	16.7	16.2	19.0	.....
Service workers	27.6	27.9	26.3	22.2	22.5	21.0	.....
Laborers, except farm	4.9	3.8	10.8	7.6	6.0	15.3	.....
Farmers, farm managers, farm laborers	0.1	[d]	0.2	0.1	[d]	0.3	.....

[a] Includes the employed (except those on public emergency work) and experienced workers seeking work. Source: U. S. Bureau of the Census. Sixteenth Census of the United States, 1940, Population, v. III, part 4, New York State Table 10a, pp. 363-365.
[b] Omitting the unclassified, as well as housewives, retired persons, and others not in the labor force.
[c] Except on public emergency work.
[d] Less than one-tenth of one percent.

crepancy of five years in the dates of the data and the differences in classification of occupations, the two tables do not afford statistical proof that the jury percentages are the result of discrimination. Such a conclusion would be justified only if we knew whether the application of the proper jury standards would affect all occupations alike, of which there is no evidence and which we regard as improbable. The percentage of persons employed or seeking employment in each occupation does not establish even an approximate ratio for those of each occupation that should appear in a fairly selected jury panel. The former is not limited, as the latter must be, to those over 21 or under 70 years of age. It is common knowledge that many employed and seekers of employment in New York are not, as jurors must be, citizens of the United States. How many could not meet the property qualifications? How many could not read and write the English language understandingly? It is only after effect is given to these admittedly constitutional requirements that we would have any figures which determined or even suggested the effect of the additional disqualifications imposed on special jurors.

An occupational comparison of the special panel with the general panel might afford some ground for an opinion on the effect of the particular practices complained of in the composition of the special panel. But no such comparison is offered. Petitioners' only statement as to the comparative make-up of the general and special panels is as follows: "While the defect of discrimination against women, particularly those who are not members of so-called 'civic conscious' organizations, permeates both the general and special juries, there is no evidence whatever that laborers, operatives, service employees, craftsmen, and foremen, are excluded from the general jury panel." What is more to the point is that petitioners adduced no

evidence whatever that the occupational composition of the general panel is substantially different from that of the special. If they are the same, then petitioner's assertion that Question 23, referred to below, somehow separates the rich from the poor is obviously without merit. It is not unlikely that the requirements of citizenship, property and literacy disqualify a greater proportion of laborers, craftsmen and service employees than of some other classes. Those who are illiterate or, if literate in their own, are unable to speak or write the English language, naturally find employment chiefly in manual work. It is impossible from the defendants' evidence in this case to find that the distribution of the jury panel among occupations is not the result of the application of legitimate standards of disqualification.

On the other hand, the evidence that there has been no discrimination as to occupation in selection of the panel, while from interested witnesses, whose duty it was to administer the law, is clear and positive and is neither contradicted nor improbable. The testimony of those in charge of the selection, offered by the defendants themselves, is that without occupational discrimination they applied the standards of the statute to all whom they examined. We are unable to find that this evidence is untrue.

(2) As to the exclusion of women, it will be remembered that the law of New York gives to women the privilege to serve but does not impose service as a duty. It is said to have been found impractical to compel large numbers of women, who have an absolute exemption, to come to the clerk's office for examination since they so generally assert their exemption. Hence, only those who volunteer or are suggested as willing to serve by other women or by organizations, including the League of Women Voters, are

subpoenaed for examination. Some effort is made by the officials also to induce women to volunteer. But the evidence does not show that women are excluded from the special jury. In this case three women talesmen were examined. One was pronounced "satisfactory" by both sides and served on the jury.

As to both women and men, it is complained that eliminations resulted unfairly from use of a questionnaire, which asked, "What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months)." Those who stated a preference, and they were many, were excluded from the special panel although they continued eligible for the general panel. The reason given for this is that service on the general panel can be adjusted to such preferences while the special panel, because of the nature of the cases tried before it, may require service at any time and for long periods. We think the phrasing of this question is less than candid in view of this purpose. But we find no evidence that it operates more misleadingly on women than on men, or on one occupation or class than on others. While it does not commend itself, it appears to be an administrative ineptitude of no constitutional significance and of no prejudice to these defendants.

(3) A more serious allegation against the special jury panel is that it is more inclined than the general panel to convict. Extensive studies have been made by the New York State Judicial Council which is under the duty of continuous study of the procedures of the courts and of making recommendations for improvement to the Legislature.[16] It is on studies and criticisms by this official body that petitioners base their charge here that the special jury is a convicting jury in an unconstitutional sense.

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[16] Judiciary Law, §§ 40–48, 29 McKinney's Consolidated Laws of New York 58–62, (pocket part), 17.

In 1937 the Council recommended abolition of struck juries,[17] foreign juries [18] and special juries.[19] It said that, "A well-administered ordinary jury system should produce jurors of as high calibre for every action as the special jury system attempts to provide in exceptional cases." [20] The recommendation was followed by the Legislature except as to special juries. In 1938 the Judicial Council renewed its recommendation as to these. It summarized that its data "indicate that special juries are prone to convict." [21] In a study of certain types of homicide cases, it found that in 1933 and 1934, special juries convicted in eighty-three percent and eighty-two percent of the cases while ordinary juries those years convicted in forty-three percent and thirty-seven percent respectively. It reported that, "The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select sup-

[17] To obtain a struck jury, the commissioner of jurors or the county clerk, in the presence of the parties, selected from the general jury list the names of forty-eight persons whom he deemed most indifferent between the parties and best qualified to try the case. The parties then alternately would each strike off twelve names from the list. The jury was chosen from the remaining twenty-four names.

[18] The foreign jury was chosen from a county adjoining that where the trial was to be held, in cases which it was thought a more impartial jury would thus be had. It lost its usefulness because of the ease with which a change of venue might be obtained. Code of Criminal Procedure, § 344.2, 66 McKinney's Consolidated Laws of New York, part 1, 622.

[19] Third Annual Report of the Judicial Council of the State of New York (1937) 123–28.

[20] *Id.* at 127.

[21] Fourth Annual Report of the Judicial Council of the State of New York (1938) 46.

posedly special juries in specific cases." [22] The Council next year reported that the general panel had not been considered adequate, largely because in its selection the standards of the statute had not been followed, and that a complete reexamination of the general panel was undertaken.[23] From time to time the Council renewed its recommendation. In 1945 it proposed that the special jury "be abolished as unnecessary and undesirable." It said, "It is undisputed that the revised jury system for New York City recommended by the Judicial Council and in operation since 1940 has succeeded in improving the quality of jurors generally by applying to all jurors the high standards which formerly were required only of special jurors. Thus, the necessity for special jurors no longer exists." [24]

While the Judicial Council has pointed out and investigated the different conviction ratios, it has at no time suggested that the special jury has been inclined to convict except where conviction was warranted. New York extends an appeal on law and fact as matter of right.[25] If there were a tendency to convict improperly, the Judicial Council, which includes the Chief Judge of the Court of Appeals and the Presiding Justice of the Appellate Division, which courts review these cases, would know it. Despite the Council's desire to abolish this jury, no such reasons were ever assigned. No statistics are produced to show that special juries have been more often reversed on the facts than ordinary ones. Of course, it would be impossible for us to say even were we to examine the cases in detail whether the difference in percentage of

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[22] *Id.* at 47.

[23] Fifth Annual Report of the Judicial Council of the State of New York (1939) 42–43.

[24] Eleventh Annual Report of the Judicial Council of the State of New York (1945) 49–50.

[25] See note 2, *supra*.

convictions indicated a too great readiness to convict on the part of special juries or a too great readiness to acquit on the part of ordinary juries, or whether the disparity reflected a difference between the ordinary case and those selected for special jury trial, rather than a reflection of an attitude on the part of either panel. It may result from the greater attention and better counsel which the prosecution gives to these important cases.

These defendants were convicted March 15, 1945, when the statistics offered here as to relative propensity of the two juries to convict were more than ten years old, and when the conditions which may have produced the discrepancy in ratio of convictions had long since been corrected.

The evidence in support of these objections may well, as the Judicial Council thought, warrant a political or social judgment that this special panel in 1945 was "unnecessary and undesirable" and that the Legislature should abolish it. But it is quite another matter to say that this Federal Court has a mandate from the Constitution to disable the special jury by setting aside its convictions. The great disparity between a legislative policy or a political judgment on the one hand and a constitutional or legal judgment on the other, finds striking illustration in the position taken by the highest judicial personages in New York State who joined in the recommendation to abolish the special jury.

Two members [26] of the Council who joined in proposing legislation to abolish the dual system sat in this case and abstained from putting their legislative recommendation into a court decision—they sustained as constitutional the system they would abolish as matter of policy. Our function concerns only constitutionality and we turn to

[26] Loughran, Ch. J., New York Court of Appeals, and Martin, P. J., App. Div. (1st Dep't).

the bearing of federal constitutional provisions on the legal issues.

It is not easy, and it should not be easy, for defendants to have proceedings set aside and held, for naught on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case, the jury exercised such discriminating and dispassionate judgment as to acquit them on three of the five counts submitted, and their conviction on a full judicial review of the facts and law has been found justified. This Court has long dealt and must continue to deal with these controversies from state courts with self-imposed restraints intended to protect itself and the state against irresponsible exercise of its unappealable power.

While this case does not involve any question as to exclusion of Negroes or any other race, the defendants rely largely upon a series of decisions in which this Court has set aside state court convictions of Negroes because Negroes were purposefully and completely excluded from the jury. However, because of the long history of unhappy relations between the two races, Congress has put these cases in a class by themselves. The Fourteenth Amendment, in addition to due process and equal protection clauses, declares that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." So empowered, the Congress on March 1, 1875, enacted that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude;" and made it a crime for any officer to exclude any citizen on those grounds. 18 Stat. 336–37, 8 U. S. C. § 44. For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination.

This statute was a factor so decisive in establishing the Negro case precedents that the Court even hinted that there might be no judicial power to intervene except in matters authorized by Acts of Congress. Referring to the provision empowering Congress to enforce the Fourteenth Amendment, it said that "All of the amendments derive much of their force from this latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation." [Italics in original.] *Ex parte Virginia*, 100 U. S. 339, 345.

It is significant that this Court never has interfered with the composition of state court juries except in cases where this guidance of Congress was applicable. In an opinion by Mr. Justice Holmes it unanimously made short work of rejecting a claim that the Fourteenth Amendment prohibits the state from excluding from the jury certain occupational groups such as lawyers, preachers, ministers, doctors, dentists, and engineers and firemen of railroad trains. *Rawlins* v. *Georgia*, 201 U. S. 638. *Cf. Brown* v. *New Jersey*, 175 U. S. 172.

We do not mean that no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law. But we do say that since Congress has considered the specific application of this Amendment to the State jury systems and has found only these discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the exacting requirements of proving clearly that

in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process.[27]

These rules to confine our use of power to responsible limits have been formulated and applied even in cases where the federal race and color statute applied. Certainly they should apply with equal, if not greater, rigor in cases that are outside the statute.

It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years.[28] *Virginia* v. *Rives*, 100 U. S. 313, 322–23; *Martin* v. *Texas*, 200 U. S. 316, 320–21; *Thomas* v. *Texas*, 212 U. S. 278, 282; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400; *Akins* v. *Texas*,

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[27] It is unnecessary to decide whether the equal protection clause of the Fourteenth Amendment might of its own force prohibit discrimination on account of race in the selection of jurors, so that such discrimination would violate the due process clause of the same Amendment. Nor need we decide whether the due process clause alone outlaws such discrimination. *Cf. Hill* v. *Texas*, 316 U. S. 400, 406: "But no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid . . . , it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand."

[28] Official records of the New York county clerk show that in the five-year period, 1940–44, 2407 new jurors were put on the special panel which is maintained at about 3,000, and 2,692 persons were removed from the list.

supra. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. *Tarrance* v. *Florida*, 188 U. S. 519; *Martin* v. *Texas*, 200 U. S. 316; *Norris* v. *Alabama*, 294 U. S. 587; *Snowden* v. *Hughes*, 321 U. S. 1, 8–9; *Akins* v. *Texas*, 325 U. S. 398, 400.

Our only source of power or guidance for interfering in this case with the state court jury system is found in the cryptic words of the Fourteenth Amendment, unaided by any word from Congress or any governing precedent in this Court. We consider first the clause which forbids a state to "deny to any person within its jurisdiction the equal protection of the laws." This prohibits prejudicial disparities before the law. Under it a system which might be constitutionally unobjectionable, if applied to all, may be brought within the prohibition if some have more favorable treatment. The inquiry under this clause involves defendants' standing before the law relative to that of others accused.

If it were proved that in 1945 an inequality between the special jury's record of convictions and that of the ordinary jury continued as it was found by the Judicial Council to have prevailed in 1933–34, some foundation would be laid for a claim of unequal treatment. No defendant has a right to escape an existing mechanism of trial merely on the ground that some other could be devised which would give him a better chance of acquittal. But in this case an alternative system actually was provided by the state to other defendants. A state is not required to try all classes of offenses in the same forum. But a discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be "equal protection of the laws." Perhaps it could be shown that the difference in percentages of

convictions was not due to a difference in attitude of the jurors but to a difference in the cases that were selected for special jury trial, or to a more intensive preparation and effort by the prosecution in cases singled out for such trial. But a ratio of conviction so disparate, if it continued until 1945, might, in absence of explanation, be taken to indicate that the special jury was, in contrast to its alternate, organized to convict. A defendant could complain of this inequality even if it were shown that a special jury court never had convicted any defendant who did not deserve conviction.

But the defendants have failed to show by any evidence whatever that this disparity in ratio of conviction existed in 1945 when they were tried. They show that it ever existed only by the studies and conclusions of the Judicial Council. The same source shows that it was corrected before these defendants were tried. As we have pointed out, this official body challenged the fairness of this dual system as formerly constituted and as early as 1937 declared that "A well-considered jury system will insure an impartial cross-section of the community on every petit jury," [29] and set out means to achieve it. We know of no reason why we should ignore or discredit their assurance that by administrative improvements in the selection of the ordinary juries they became the substantial equivalent of the special jury before these trials took place.

We hold, therefore, that defendants have not carried the burden of showing that the method of their trial denied them equal protection of the law.

The defendants' other objection is grounded on that clause of the Fourteenth Amendment which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." It comprises objections which might be urged against any jury made up

[29] Third Annual Report of the Judicial Council of the State of New York (1937) 123.

as the special jury was, even if it were the only jury in use in the state. It does not depend upon comparison with the jury facilities afforded other defendants.

This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class. *Rawlins* v. *Georgia*, 201 U. S. 638, 640. *Cf. Strauder* v. *West Virginia*, 100 U. S. 303. Relief has been held unavailable to a negro who objected that all white persons were purposely excluded from the grand jury that indicted him. *Haraway* v. *State*, 203 Ark. 912. Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment.

These defendants rely heavily on arguments drawn from our decisions in *Glasser* v. *United States*, 315 U. S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; and *Ballard* v. *United States*, 329 U. S. 187. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process.

The due process clause is one of comprehensive generality, and in reducing it to apply in concrete cases there are different schools of thought. One is that its content on any subject is to be determined by the content of certain relevant other Amendments in the Bill of Rights which originally imposed restraints on only the federal Government but which the Fourteenth Amendment deflected against the states. The other theory is that the

clause has an independent content apart from, and in addition to, any and all other Amendments. This meaning is derived from the history, evolution and present nature of our institutions and is to be spelled out from time to time in specific cases by the judiciary.

To treat first of the former doctrine, it steadily has been ruled that the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. "This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether." *Palko* v. *Connecticut*, 302 U. S. 319, 324, and cases there cited. Unless we are now so to change our interpretation as to withdraw from the states the power so lately conceded to be theirs, this would end the matter under the view that the force of the due process clause is exhausted when it has applied the principles of other relevant Amendments.

But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense. *Palko* v. *Connecticut*, 302 U. S. 319, 327; *Mooney* v. *Hollohan*, 294 U. S. 103; *Moore* v. *Dempsey*, 261 U. S. 86. Trial must be held before a tribunal not biased by interest in the event. *Tumey* v. *Ohio*, 273 U. S. 510. Undoubtedly a system of exclusions could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process. A verdict on the evidence, however, is all an accused can claim; he is not entitled to a set-up that will give a chance of escape after he is properly proven guilty. Society also has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury.

To establish the unfairness of this tribunal and the lack of due process afforded to one who is being tried before it, the defendants assert two defects in its composition: first, that it unconstitutionally excluded women, and, second, that it unconstitutionally excluded laborers, craftsmen, service employees, and others of like occupation, amounting in sum to the exclusion of an economic class.

Assuming that defendants, not being women, have standing to complain of exclusion of women from the general and special jury panels, we are unable to sustain their objection. Approximately 7,000 women were on the general panel of 60,000 and 30 were on the special panel. One served on the jury which convicted the petitioners. The proportion of women on the jury panels did not equal their proportion of the population. There may be no logical reason for this, but there is an historical one. Until recently, and for nearly a half-century after the Fourteenth Amendment was adopted, it was universal practice in the United States to allow only men to sit on juries. The first state to permit women jurors was Washington, and it did not do so until 1911.[20] In 1942 only 28 states permitted women to serve on juries and they were still disqualified in the other 20. Moreover, in 15 of the 28 states which permitted women to serve, they might claim exemption because of their sex.[21] It would, in the light of this history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts

[20] 1911 Laws of Washington, c. 57. See Carson, Women Jurors (1928).

[21] Report to the Judicial Conference of the Committee on Selection of Jurors (1942) 23. A later bulletin of the Women's Bureau of the United States Department of Labor showed that in 1945, 31 States permitted jury service by women, exemption being allowed in 15 of them. But 17 States still withheld their approval of women on juries. A pamphlet of the Women's Bureau, as yet unpublished, shows that at this time four more states find women acceptable as jurors.

rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state law they are eligible [32] but woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood.

The other objection which petitioners urge under the due process clause is that the special jury panel was invalidated by exclusion of an economic group comprising such specified classifications as laborers, craftsmen and service employees. They argue that the jury panel was chosen "with a purpose to obtain persons of conservative views, persons of the upper economic and social stratum in New York County, persons having a tendency to convict defendants accused of crime, and to exclude those who might understand the point of view of the laboring man." As we have pointed out, there is no proof of exclusion of these.[33] At most, the proof shows lack of proportional representation and there is an utter deficiency of proof that this was the result of a purpose to discriminate against this

[32] See Judicial Code, §§ 275, 276, 28 U. S. C. §§ 411, 412; *Ballard* v. *United States*, 329 U. S. 187.

[33] It is worth comment that the annual reports of the Judicial Council, on which petitioners heavily rely, although they urge strongly and persistently that the special jury be abolished, do not give as one of the reasons the social make-up of the panel. This is odd, if that reason were valid, since the Council obviously was interested in urging all good reasons which would support its strong disapproval and its reiterated recommendation.

group as such. The uncontradicted evidence is that no person was excluded because of his occupation or economic status. All were subjected to the same tests of intelligence, citizenship and understanding of English. The state's right to apply these tests is not open to doubt even though they disqualify, especially in the conditions that prevail in New York, a disproportionate number of manual workers. A fair application of literacy, intelligence and other tests would hardly act with proportional equality on all levels of life. The most that the evidence does is to raise, rather than answer, the question whether there was an unlawful disproportionate representation of lower income groups on the special jury.

Even in the Negro cases this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution. *Akins* v. *Texas*, 325 U. S. 398. If the Court has hesitated to require proportional representation where but two groups need be considered and identification of each group is fairly clear, how much more imprudent would it be to require proportional representation of economic classes. The occupations which are said to comprise the economic class allegedly excluded from the special panel are separated by such uncertain lines that the defendants' two exhibits are based on different classifications which are numerous and overlapping.

No significant difference in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it.[34] It would require large assumptions to say that one's present economic status, in a society as fluid as ours, determines his outlook in the trial of cases in general or of this

[34] *Cf. Rawlins* v. *Georgia*, 201 U. S. 638, 640: "The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act."

one in particular. There is of course legitimate conflict of interest among economic groups, but they are so many and so overlie each other that not all can be significant. There is entrepreneur and wage-earner, consumer and producer, taxpayer and civil servant, foreman and laborer, white-collar worker and manual laborer. But we are not ready to assume that these differences of function degenerate into a hostility such that one cannot expect justice at the hands of occupations and groups other than his own. Were this true, an extremely rich man could rarely have a fair trial, for his class is not often found sitting on juries.[35]

Nor is there any such persuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations, as would be the case with regard to purposeful discriminations because of race or color. We do not need to find prejudice in these latter exclusions, but *cf. Strauder* v. *West Virginia*, 100 U. S. 303, 306–309, for Congress has forbidden them, and a tribunal set up in defiance of its command is an unlawful one whether we think it unfair or not. But as to other exclusions, we must find them such as to deny a fair trial before they can be labeled as unconstitutional.

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[35] We are unable to say that mere exclusion of jurors of one's occupation renders a jury unconstitutional, even though the occupation tends to give those who practice it a particular and distinctive viewpoint. New York has some 20,000 policemen presumably otherwise qualified for jury service. It is not unknown that a defendant is a policeman. Can he not be constitutionally tried if policemen are exempt from service or even excluded from the panel? There is some discretion left in the states to say that some occupations are more needed at their work than on jury duty and, perhaps, that some have occupational attitudes that make it appropriate to leave them off the list so long as an unexceptionable list remains on call. *Cf. Rawlins* v. *Georgia*, 201 U. S. 638. See Knox, *Selection of Federal Jurors*, 31 Journal of the American Judicature Society 9, 11.

There may be special cases where exclusion of laborers would indicate that those sitting were prejudiced against labor defendants, as where a labor leader is on trial on charges growing out of a labor dispute. The situation would be similar to that of a Negro who confronts a jury on which no Negro is allowed to sit. He might very well say that a community which purposely discriminates against all Negroes discriminates against him. But it is quite different if we assume that "persons of conservative views" do predominate on the special jury. Does it follow that "liberals" would be more favorably disposed toward a defense that nominal labor leaders were hiring out to employers to "handle" their labor problems? Does it follow that a jury from the "upper economic and social stratum" would be more disposed to convict those who so undertake to serve two masters than "those who might understand the point of view of the laboring man"? We should think it might be the other way about and defendants offer nothing but assertion to convince us. Our attention, moreover, is called to federal court records which show that Fay reported a net taxable income of over $65,000 for the years 1940 to 1942, while Bove reported over $39,000 for a similar period, both of them exclusive of the sums received from the contractors and involved in these charges. These earnings do not identify them very closely with the viewpoint of the depressed classes. The group with which they might be most closely identified is organized labor. But it cannot be claimed that union members were excluded from this special panel since three union members were called for examination on this particular jury, two being rejected by the People and one by the defendants themselves. The defendants have shown no intentional and purposeful exclusion of any class, and they have shown none that was prejudicial to them. They have had a fair trial, and no reason appears why they should escape its results.

The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court always has been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences.[36]

[36] While English common law is the source from which it often is assumed a uniform system was derived by the States of the United States, it must not be overlooked that many of them have been deeply influenced by Roman and civil law to which their history exposed them. None of the territory west of the Alleghenies was more than briefly or casually subject to common law before the Revolution. French civil law prevailed in most of the Ohio and Mississippi Valleys from their settlement until Wolfe's decisive victory before Quebec in 1763. Its ascendancy in the north then was broken, and in 1803, the Louisiana Purchase ended French sovereignty in the rest of the Mississippi area. Louisiana continues, however, a system of law based on the Code Napoleon. The Southwest and Florida once were Spanish. See Colvin, *Participation of the United States of America with the Republics of Latin America in the Common Heritage of Roman and Civil Law*, 10 Proceedings of the Eighth American Scientific Congress 467.

Even among the early seaboard States, the English common law had rivals. The Swedes on the banks of the Delaware held one of the earliest jury trials on this continent. The Governor followed Swedish law and custom in calling to his aid in judging "assistants" who were selected from among "the principal and wisest inhabitants" and were both judges and jurors and sometimes witnesses. See 1 Johnson, The Swedish Settlements on the Delaware (1911) 450 *et seq.* In New York, there was a deep and persistent influence from Roman Dutch

We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice. The jury system is one which has undergone great modifications in its long history, see *People* v. *Dunn*, 157 N. Y. 528, 52 N. E. 572, and it is still undergoing revision and adaptation to adjust it to the tensions of time and locality. In no place are American institutions put to greater strain than in the City of New York with its some seven and a half million inhabitants gathered from the four corners of the earth and a daily transient flow of two million, with all that this implies of difficulty in law enforcement. The citizen there, as in other jurisdictions, has been called for jury service to perform a variety of functions—the grand jury, the petit jury, the sheriff's jury, the coroner's jury, the foreign jury, the struck jury, and the special jury. The states have had different and constantly changing tests of eligibility for service. Evolution of the jury continues even now, and many experiments are under way that were strange to the common law. Some states have taken measures to restrict its use; others, where jury service is a hardship, diminish the required number of jurors. Some states no longer require the unanimous verdict; others add alternate or substitute jurors to avoid mistrial in case of sickness or death. Some states have abolished the general verdict and require

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law. Upon capitulation of New Amsterdam, it was stipulated that certain Dutch law, and judgments and customs should be respected. But even beyond this, in the organization of the courts the Dutch rule persisted although contrary to the "Duke's Laws" enacted by the conqueror. The history of the early Dutch influence in New York court procedure was preserved by the diligence and foresight of Judge Daly. 1 E. D. Smith's Reports (New York Common Pleas) xvii, xxxiv, xxxvii. The Roman-Dutch element in New York law is recognized by its courts, *e. g.*, *Dunham* v. *Williams*, 37 N. Y. 251, 253; *Van Giessen* v. *Bridgford*, 83 N. Y. 348, 356; *Smith* v. *Rentz*, 131 N. Y. 169, 175.

answers to specific questions.[37] Well has it been said of our power to limit state action that "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311.

As there is no violation of a federal statute alleged, the challenge to this judgment under the due process clause must stand or fall on a showing that these defendants have had a trial so unfair as to amount to a taking of their liberty without due process of law. On this record we think that showing has not been made.

Affirmed.

[37] See 8 Encyclopedia of the Social Sciences 492.

SUPREME COURT OF THE UNITED STATES

Nos. 377 AND 452.—OCTOBER TERM, 1946.

Joseph S. Fay, Petitioner, 377 v. The People of the State of New York. James Bove, Petitioner, 452 v. The People of the State of New York.	On Writs of Certiorari to the Court of Appeals of the State of New York.

[June 23, 1947.]

MR. JUSTICE MURPHY, dissenting.

The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community. That means that juries must be chosen without systematic and intentional exclusion of any otherwise qualified group of individuals. *Smith* v. *Texas*, 311 U. S. 128. Only in that way can the democratic traditions of the jury system be preserved. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220; *Glasser* v. *United States*, 315 U. S. 60, 85. It is because I believe that this constitutional standard of jury selection has been ignored in the creation of the so-called "blue ribbon" jury panel in this case that I am forced to dissent.

Preliminarily, it should be noted that legislation by Congress prohibiting the particular kind of inequality here involved is unnecessary to enable us to strike it down under the Constitution. While Congress has the power to enforce by appropriate legislation the provisions of the Fourteenth Amendment, and has done so relative to discrimination in jury selection on the basis of race or color, its failure to legislate as to economic or other discrimination in jury selection does not permit us

to stand idly by. We have consistently interfered with state procedure and state legislation when we felt that they were inconsistent with the Fourteenth Amendment or with the federal commerce power despite Congressional silence on the matter involved. See, *e. g.*, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Nippert* v. *Richmond*, 327 U. S. 416; *Morgan* v. *Virginia*, 328 U. S. 373. And so in this case we are entitled to judge the action of New York by constitutional standards without regard to the absence of relevant federal legislation.

The constitutional vice inherent in the type of "blue ribbon" jury panel here involved is that it rests upon intentional and systematic exclusion of certain classes of people who are admittedly qualified to serve on the general jury panel. Whatever may be the standards erected by jury officials for distinguishing between those eligible for such a "blue ribbon" panel and those who are not, the distinction itself is an invalid one. It denies the defendant his constitutional right to be tried by a jury fairly drawn from a cross-section of the community. It forces upon him a jury drawn from a panel chosen in a manner which tends to obliterate the representative basis of the jury.

The selection of the "blue ribbon" panel in this case rests upon the "degree of intelligence as revealed by the questionnaire" sent to prospective jurors, augmented by personal interviews. The questionnaire, however, does not purport to be a test of native intelligence, nor does it appear to offer any sound basis for distinguishing the intelligence of one person from another. The undeniable result has been to permit the jury officials to formulate whatever standards they desire, whether in terms of "intelligence" or some other factor, to eliminate persons from the "blue ribbon" panel, even though they admittedly are

qualified for general jury service. That fact is strikingly borne out by the statistics compiled in this case as to the personnel of the "blue ribbon" panel. Certain classes of individuals are totally unrepresented on the panel despite their general qualifications and despite the fact that high intelligence is to be found in such classes.

	Percentage of total experienced labor forces in Manhattan.	Percentage of representation on "blue ribbon" panel.
Professional and semi-professional	12.1	18.8
Proprietors, managers and officials	9.3	43
Clerical, sales and kindred workers	21.3	38
Craftsmen, foremen and kindred workers	7.7	0.2
Operatives and kindred workers	17	0
Service workers	27.6	0
Laborers	4.9	0
Farmers	0.1	0

Such statistics can only mean that the jury officials have evolved some standard other than that of "intelligence" to exclude certain persons from the "blue ribbon" panel. And that standard is apparently of an economic or social nature, unjustified by the democratic principles of the jury system.

The Court points out some of the difficulties involved in comparing the personnel of the panel with 1940 census figures. But we are dealing here with a very subtle and sophisticated form of discrimination which does not lend itself to easy or precise proof. The proof here is adequate enough to demonstrate that this panel, like every discriminatorily selected "blue ribbon" panel, suffers from a constitutional infirmity. That infirmity is the denial of equal protection to those who are tried by a jury drawn from a "blue ribbon" panel. Such a panel is narrower and different from that used in forming juries to try the vast majority of other accused persons. To the extent

of that difference, therefore, the persons tried by "blue ribbon" juries receive unequal protection.

In addition, as illustrated in this case, the distinction that is drawn in fact between "blue ribbon" jurors and general jurors is often of such a character as to destroy the representative nature of the "blue ribbon" panel. There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people. *Smith* v. *Texas, supra.* To the extent that a "blue ribbon" panel fails to reflect this democratic principle, it is constitutionally defective.

The Court demonstrates rather convincingly that it is difficult to prove that the particular petitioners were prejudiced by the discrimination practiced in this case. Yet that should not excuse the failure to comply with the constitutional standard of jury selection. We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. It may be absent in one case and present in another; it may gradually and silently erode the jury system before it becomes evident. But it is no less real or meaningful for our purposes. If the constitutional right to a jury

impartially drawn from a cross-section of the community has been violated, we should vindicate that right even though the effect of the violation has not yet put in a tangible appearance. Otherwise that right may be irretrievably lost in a welter of evidentiary rules.

Since this "blue ribbon" panel falls short of the constitutional standard of jury selection, the judgments below should be reversed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.